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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

v.

FREDDIE LEE TAYLOR, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
DANE R. GILLETTE
Senior Assistant Attorney General
RONALD S. MATTHIAS
Supervising Deputy Attorney General
JOAN KILLEEN
Supervising Deputy Attorney General
Counsel of Record
50 Fremont St., Room 300
San Francisco, CA 94105
Telephone: (415) 356-6193
Fax: (415) 356-6190
Counsel for Petitioner

29 pp

(CAPITAL CASE)

QUESTIONS PRESENTED

1. May a District Court hold in abeyance a habeas corpus petition containing exhausted claims while the state prisoner returns to state court to exhaust known, but as yet unexhausted, claims.

2. May a District Court permit amendment of an abeyant petition by the addition of claims following state court exhaustion.

LIST OF PARTIES

Arthur Calderon, Warden, California State Prison at San Quentin, was the petitioner in proceedings before the United States Court of Appeals for the Ninth Circuit, and is the petitioner in this Petition for Writ of Certiorari.

The United States District Court for the Northern District of California was the respondent in proceedings before the United States Court of Appeals for the Ninth Circuit.

Freddie Lee Taylor, a state prisoner sentenced to death under the laws of the State of California, was the real party in interest in proceedings before the United States Court of Appeals for the Ninth Circuit, and is respondent in this Petition for Writ of Certiorari.

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ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

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FREDDIE LEE TAYLOR, *Respondent*.

Petitioner Arthur Calderon, Warden, California State Prison at San Quentin, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in *Calderon v. United States District Court (Taylor)*, 134 F.3d 981 (9th Cir. 1998). (App. A, 1-18.)

The order of the United States District Court for the Northern District of California was unreported. (App. B, 19-50.)

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 26, 1998. Rehearing and rehearing en banc were denied on March 6, 1998. (App. C.) This Petition for Writ of Certiorari follows within 90 days. 28 U.S.C. § 2101(c); Supreme

Court Rules 13.1, 13.3. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONS, STATUTES OR REGULATIONS

1. 28 U.S.C. § 2254(b). (App. D.)
2. 28 U.S.C. § 2244. (App. E.)

STATEMENT OF THE CASE

On December 31, 1990, the California Supreme Court affirmed respondent Freddie Lee Taylor's (hereafter Taylor) conviction of first degree murder and sentence of death. *People v. Taylor*, 52 Cal.3d 719, 801 P.2d 1142, 276 Cal.Rptr. 391 (1990). It had denied his first state habeas corpus petition on September 26, 1990.

On June 12, 1992, nearly six years ago, the United States District Court for the Northern District of California appointed counsel for Taylor, and commenced a series of stays of Taylor's execution. Over three years later, on July 10, 1995, Taylor filed his petition for writ of habeas corpus under 28 U.S.C. § 2254, raising 46 claims, most of which were unexhausted.

The State moved to dismiss the petition for failure to exhaust state remedies. The District Court orally denied the motion at a hearing on October 20, 1995, and stated it would identify the unexhausted claims and hold the mixed petition in abeyance pending exhaustion in state court, pursuant to former Northern District Local Rule 296-8(e). Despite the District Court's statement that an order would be forthcoming, however, it issued no written ruling with respect to exhaustion, and Taylor did not return to state court.

On February 4, 1997, the State moved for reconsideration of the District Court's oral ruling. As a

basis for reconsideration, the State cited the Ninth Circuit's intervening decision in *Greenawalt v. Stewart,* 105 F.3d 1268 (9th Cir. 1997), which held that a District Court must dismiss mixed petitions rather than hold them in abeyance.

After hearing the motion for reconsideration, the District Court issued a written ruling identifying the unexhausted claims, finding 27 completely unexhausted and six partially unexhausted, and stating it would permit Taylor to delete his unexhausted claims. The District Court further stated it would hold in abeyance the amended petition containing only exhausted claims while Taylor pursued exhaustion in state court, and that, "Upon completion of state proceedings, [Taylor] shall file a second amended petition." Thereafter, Taylor amended his federal petition to delete the unexhausted claims, leaving only those that were exhausted, and filed a habeas corpus petition in state court to exhaust the remaining claims.

The State filed a petition for writ of mandamus in the Court of Appeals under 28 U.S.C. § 1651(a) to challenge the District Court's abeyance order as well as its order directing Taylor to file a second amended petition following exhaustion. The court denied the petition, and denied the State's petition for rehearing and suggestion for rehearing en banc.

REASONS FOR GRANTING THE PETITION

Summary of Argument

This case presents significant issues that recur with ever greater frequency, in both capital and non-capital cases, concerning the adjudication of habeas corpus

petitions brought by state prisoners.[1] The issues are: (1) whether a District Court may hold in abeyance a habeas corpus petition containing exhausted claims while a state prisoner exhausts additional claims of which he was aware when he filed his petition; and (2) whether a District Court may permit amendment of an abeyant petition by the addition of claims following state court exhaustion. The issues raise important questions concerning the viability of the exhaustion doctrine and the application of the abuse of the writ doctrine.

The Court of Appeals has sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. The court has also decided an important question of federal law that has not been, but should be, settled by this Court. Rule 10(a), (c), Rules of the Supreme Court of the United States.

The State's argument is a simple one. A state prisoner must exhaust his state court remedies on each of

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1. The procedural device employed by the District Court has become the norm for capital habeas corpus cases in California in which petitioners have recently had to file habeas corpus petitions to meet the one-year statute of limitations in 28 U.S.C. § 2244(d), as enacted by the Antiterrorism and Effective Death Penalty Act of 1996 (Act). Typically, petitioners will time the filing of their exhausted claims to achieve ostensible compliance with the Act's limitations period, but will accompany such a petition with a request to hold the habeas proceedings in abeyance so that the petitioner can exhaust known but as yet unexhausted claims. *See, e.g., Ashmus v. Calderon*, 977 F.Supp. 987 (N.D. Cal. 1997). In many cases, the petitioner also asks for equitable tolling of the limitations period so that he can further investigate his claims before he is required to exhaust them or so that he can complete preparation of the "exhausted claims" petition. As explained below, this procedural device, which the district courts in California have, almost without exception, allowed, has arisen because the Ninth Circuit recently disapproved local rules that had purportedly authorized district courts to stay mixed habeas corpus petitions pending exhaustion.

his claims *before* he comes to federal court, at which time he must file one, fully exhausted petition. When the petitioner files his petition in federal court, he must be prepared to litigate that petition, not some future petition. He cannot circumvent the rules requiring exhaustion by filing a habeas corpus petition containing exhausted claims and then asking the District Court to hold the petition in abeyance while he exhausts claims of which he was already aware, but withheld to avoid dismissal as a mixed petition. Nor can he avoid the abuse of the writ doctrine by later amending his abeyant petition to add newly exhausted claims.

This Court's precedents and the statutory scheme governing habeas corpus petitions brought by state prisoners have made clear that before a petitioner brings his claims to federal court, he must have taken each of his claims to state court. If a petitioner seeks to bring new claims after the filing of his initial petition, he must satisfy the limitations of the abuse of the writ doctrine. If a petitioner seeks to bring a second or successive petition under the Act, he must comply with the strict limitations on such petitions.

Notwithstanding these precedents and rules, however, the Court of Appeals, in addressing a question of first impression before it, effectively sanctioned a procedure that undermines these basic principles. The Court of Appeals' decision, which let stand the District Court's abeyance order, directly undermines the efforts of both this Court and Congress to control the proliferation of habeas corpus proceedings and, in capital cases, to reduce the ever increasing incidence of delay. The procedural device employed by the District Court, which the Court of Appeals recognized as a "relatively simple way around the . . . proscription against holding mixed petitions in abeyance pending exhaustion," should be rejected as a transparent attempt to avoid the exhaustion and abuse of the writ doctrines, and to defeat Congressional efforts to

halt the endless delay in capital habeas litigation. The cynical manipulation of the rules governing habeas corpus litigation by petitioners who seek to undo every decision and circumvent every ruling should no longer be tolerated.

Ruling Below

The procedural history of this case is protracted, but has yet to result in a petition that Taylor wishes to pursue in federal court. In June 1992, the District Court appointed counsel for Taylor and stayed execution of his sentence of death. Over three years later, in July 1995, Taylor filed his initial petition for writ of habeas corpus raising, by his own admission, numerous unexhausted claims. The State moved to dismiss for lack of exhaustion. In October 1995, the District Court held a hearing, during which it stated that it would not dismiss the petition, but would instead stay it pending exhaustion of the unexhausted claims. The stay procedure was sanctioned by former Northern District Local Rule 296-8(e)[2] and by dictum in an earlier Ninth Circuit case, *Neuschafer v. Whitley,* 860 F.2d 1470 (9th Cir. 1988). The District Court also stated that it would identify the unexhausted claims in a written order. No written order was forthcoming, however.

In 1997, the Ninth Circuit Court of Appeals issued a trio of cases which

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2. Northern District Local Rule 296-8(e) provided: "If the petition indicates that there are unexhausted claims for which a state court remedy is still available, petitioner will be granted a sixty (60) day stay of execution in which to seek a further stay from the state court in order to litigate the unexhausted claims in state court. During the proceedings in state court, the proceedings on the petition will be stayed. After the state court proceedings have been completed, petitioner may amend the petition with respect to the newly exhausted claims."

> made it manifestly clear that both the *Neuschafer* dictum and Local Rule 296-8(e) are inconsistent with the mandate of *Rose* [*v. Lundy*, 455 U.S. 509 (1982)], and that the 'stay-and-abeyance' procedure for mixed petitions that they begot will no longer be considered a valid exercise of judicial power.

App. A at 9, discussing *Greenawalt v. Stewart*, 105 F.3d 1268 (9th Cir.), *cert. denied*, 117 S.Ct. 1794 (1997), *Calderon v. United States District Court (Gordon)*, 107 F.3d 756 (9th Cir.), *cert. denied*, 118 S.Ct. 265 (1997), and *Reutter v. Crandel*, 109 F.3d 575 (9th Cir.), *cert. denied*, 118 S.Ct. 142 (1997).

In February 1997, after the first of these cases was decided, the State sought reconsideration of the District Court's 1995 oral ruling that Taylor's mixed petition would be stayed pending exhaustion after it identified his unexhausted claims. In a ruling issued on April 1, 1997, the District Court grudgingly acknowledged that its earlier decision to stay the mixed petition would no longer be permitted under the Ninth Circuit's recent authority. App. B at 31-33. However, it found a "relatively simple way around" that dilemma. It noted that the Ninth Circuit, in distinguishing one of its earlier cases in *Greenawalt*, 105 F.3d at 1274, had said that a District Court could stay a petition that it could validly consider on the merits, i.e., a fully exhausted petition. App. B at 32, 43.

Accordingly, the District Court concluded that Taylor could amend his petition to delete his unexhausted claims, that the court could then hold in abeyance the resulting exhausted petition, and that Taylor could later amend his petition to add back the claims following exhaustion. App. B at 40-46, 49-50. By this contrivance, the District Court allowed Taylor to follow the identical procedure that he would have followed under the discredited local rule, except that the stayed petition was exhausted (as amended by deletion) rather than mixed (as originally

filed). The effect on the State--and the ensuing interference with its ability to execute its criminal judgments--is of course identical.

The State filed a petition for writ of mandamus in the Court of Appeals, arguing that the District Court's order defeated the doctrines of exhaustion and abuse of the writ just as effectively as if the petition were mixed. The State argued that the District Court had two options for dealing with Taylor's initial, mixed petition. It could have dismissed the entire petition, leaving Taylor to return to state court to exhaust his unexhausted claims, or it could have allowed Taylor to delete the unexhausted claims and proceed in federal court on the remaining exhausted claims.[3] The State argued there was no authority for the option chosen by the District Court -- abeyance of an amended petition containing exhausted claims while Taylor returned to state court to exhaust the unexhausted claims, which is effectively no different from the stay of a mixed petition. The State asked that the District Court's order -- permitting abeyance of the exhausted claims petition and later amendment of the petition with newly exhausted claims -- be vacated.

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3. The State assumed, both at the time of filing its initial motion to dismiss in August 1995 and at the time of filing its motion for reconsideration in February 1997, that the District Court could dismiss Taylor's mixed petition "without prejudice" to refiling after completion of state exhaustion. The State did not argue that the Act required dismissal "with prejudice," in part because of uncertainty that then existed concerning application of amended 28 U.S.C. § 2244(b) to Taylor's case in light of his having filing a petition, albeit a defective one, before passage of the Act. By February 1997, the Ninth Circuit had ruled that the Act applied only to "cases" filed after its enactment. *Jeffries v. Wood*, 103 F.3d 827 (9th Cir. 1996); *see also Lindh v. Murphy*, ___ U.S. ___, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). Since Taylor chose not to take *any* dismissal, and instead chose to delete his unexhausted claims, the issue whether dismissal of his initial, mixed petition could have been "without prejudice" was never confronted.

The Court of Appeals recognized that "[t]he legitimacy of the District Court's self-titled 'procedural device of withdrawal and abeyance' presents an important and difficult question of first impression in this circuit." App. A at 4. The court noted that "[t]he 'exhaustion' doctrine has long been one of the pillars of federal habeas corpus jurisdiction," and that this Court had, in *Rose v. Lundy*, 455 U.S. at 510, adopted a rule of "total exhaustion" and directed that District Courts must dismiss mixed petitions containing both exhausted and unexhausted claims, leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the District Court. App. A at 7-8. The Court of Appeals further noted that, despite *Rose*, it had proposed an alternative procedure in *Neuschafer v. Whitley*, 860 F.2d 1470, allowing a district court to hold a mixed petition in abeyance while the petitioner exhausted his state remedies, a procedure later codified in local rules for each of California's four districts, of which the Northern District's Local Rule 296-8(e) is typical. App. A at 8.

The Court of Appeals then stated that, in the trio of recent cases noted above, it had since found the local rules and its dictum in *Neuschafer* conflicted with this Court's mandate in *Rose v. Lundy* that mixed petitions be dismissed. App. A at 9. Although the District Court conceded that the new rule in the Ninth Circuit required dismissal -- not "abeyance" -- of mixed petitions, it "discovered a relatively simple way around the *Greenawalt-Gordon-Reutter* proscription against holding mixed petitions in abeyance pending exhaustion in state court," App. A at 10, by allowing Taylor to delete the unexhausted claims and holding the amended, exhausted claims petition in abeyance, pending exhaustion and future amendment with the newly exhausted claims. App. A at 10-11.

The State argued that the District Court's procedural device was merely an end run around the exhaustion and abuse of the writ doctrines. However, in denying relief, the Court of Appeals noted that it had already concluded "'[a] district court has discretion to stay a petition which it may validly consider on the merits.'" App. A at 13-14, quoting *Greenawalt v. Stewart*, 105 F.3d at 1274. Since the District Court had discretion to consider the amended, exhausted claims petition, it had discretion to stay it. App. A at 14-16. The court based its denial of relief on the additional ground that the State could not provide supporting authority for the proposition that a district court may not stay an exhausted claims petition while the petitioner exhausts additional claims in state court. App. A at 15-16.

The Court of Appeals further concluded, contrary to the State's reading of the record, that the District Court had only "invited" Taylor to file an amended petition adding back the deleted claims after exhaustion, but that it had not indicated how it would rule on such a motion. App. A at 17. Nevertheless, the court agreed with the State's position that any subsequent amendment of a formerly exhausted petition to add newly exhausted claims could be barred as an abuse of the writ. App. A at 17, citing *McCleskey v. Zant*, 499 U.S. 467, 493-96 (1991), *Rose v. Lundy*, 455 U.S. at 520, and Rule 9(b), Rules Governing Section 2254 Cases, 28 U.S.C., foll. § 2254.

On the broader dispute over the propriety of the stay-and-abeyance, the Court of Appeals conceded that there was "much force to the State's position." The court also professed to understand the State's frustration. App. A at 18. However, it declined to grant mandamus relief. *Id.*

The State sought rehearing and suggested rehearing en banc. The State argued that, consistent with the Court of Appeals' statement that the issue was one of first impression, it was not surprising that the State had been unable to cite specific authority in support of its position.

The State had asked the Court of Appeals to exercise its supervisory mandamus authority, which the three-Judge panel had found would be appropriate, App. A at 6, but which it declined to exercise. The State further argued that since the court had relied on its prior authority to deny relief, the court should rehear the case en banc. The State also argued that the court should find any future amendment of Taylor's petition with claims of which he was aware when he filed his petition to be an abuse of the writ as a matter of law and that, since the ultimate objective of the abeyance procedure (to effect belated amendment of pending petitions) was impermissible, it could not supply its justification. The court declined to grant rehearing or rehearing en banc. App. C.

Rose v. Lundy Created a Simple Rule That Has Been Thwarted by the Court of Appeals' Approval of the Procedural Contrivance Used by the District Court

A federal district court cannot review the merits of a habeas corpus petition unless all of the claims contained in the petition have been exhausted in the state courts. 28 U.S.C. § 2254(b); *Rose v. Lundy*, 455 U.S. at 520. The exhaustion doctrine is based on a policy of federal and state comity, designed to give state courts the initial opportunity to correct alleged constitutional deprivations. *See Picard v. Connor*, 404 U.S. 270, 275 (1971).

> The purpose of exhaustion is not to create a procedural hurdle on the path to federal habeas court, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated *before resort to federal court.*

Keeney v. Tamayo-Reyes, 504 U.S. 1, 10 (1992) (emphasis added).

In *Rose v. Lundy*, 455 U.S. at 520, this Court interpreted § 2254 to provide a "simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you have first taken each one to state court." The Court of Appeals understood this simple rule.

> The Supreme Court repeatedly has instructed the District Courts to dismiss "mixed" petitions containing any unexhausted claims. In *Rose v. Lundy*, 455 U.S. 509 (1982) (*Rose*), the Court wrote that "because a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief, we hold that *a District Court must dismiss* habeas petitions containing both unexhausted and exhausted claims." *Id.* at 522 (emphasis added). More recently, the Court held that "[r]espondent's habeas petition should have been dismissed if state remedies had not been exhausted as to any of the federal claims." *Castille v. Peoples*, 489 U.S. 346, 349 (1989) (unanimous opinion); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ("This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims.").

Greenawalt v. Stewart, 105 F.3d at 1273-74.

Rose provided two options for a petitioner whose petition contained unexhausted claims:

> [W]e hold that a District Court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the District Court.

455 U.S. at 510; *see id.* at 520. The Court of Appeals understood this rule as well. App. A at 8.

Despite the clarity of this Court's rule, however, the Court of Appeals sanctioned a procedural device that simultaneously defeated the policies underlying exhaustion and increased the burden on federal courts by explicitly providing for the filing of multiple petitions. The device does not promote timely efforts at exhaustion by state prisoners. On the contrary, it allows a petitioner to come first to federal court, obtain a stay of his sentence, obtain federal funding and counsel, file a petition that he knows does not contain all of his claims, and ask the District Court to maintain federal jurisdiction by continuing the stay and holding the petition in abeyance while he returns to state court to exhaust his remaining claims. The device not only expressly contemplates but invites the filing of a second or successive petition, in the form of an amendment to the initial petition, that contains the belatedly exhausted claims. Indeed, the expected filing of the amended petition is the very reason for holding in abeyance the first petition.

The burden on the federal courts is further increased by litigation involving the so-called abeyant petition. The parties may continue to litigate whether the claims in the abeyant petition are in fact exhausted, and, in some cases, petitioners seek discovery or other forms of relief with respect to the exhausted claims that have theoretically been stayed. *See, e.g.,* App. B at 47-48 (discovery in federal court on "abeyant" petition denied only because District Court found it went to unexhausted, rather than exhausted, claims). In the meantime, the petitioners are pursuing their state court remedies, which requires the State to defend its judgments in two forums at the same time. The procedural device not only increases the burden on both the parties and the courts, it defeats the rule that a petitioner should not come to federal court

unless and until he has exhausted his state remedies on all of the claims he wishes to raise.

The Court of Appeals rejected the State's argument that, if a petitioner chose to retain his exhausted claims in federal court, the State would be entitled to litigate them forthwith. App. A at 12-16. It relied on its earlier statement that a District Court may stay a petition which it could validly consider, and on its finding that the State could not muster contrary authority with respect to the heretofore unimaginable prospect that *Rose*'s teaching might be so easily circumvented by the procedural contrivance used here. App. A at 13-16.[4] However, *Rose* did state clearly that,

> Rather than increasing the burden on federal courts, strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a *single* habeas petition.

455 U.S. at 520 (emphasis added). Obviously, when deciding *Rose*, this Court could not have contemplated that petitioners would be allowed to avoid its total exhaustion rule simply by filing multiple amended

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4. The Court of Appeals cited two cases, *Burris v. Farley*, 51 F.3d 655, 658-59 (7th Cir. 1995), and *Thompson v. Wainwright*, 714 F.2d 1495, 1498 (11th Cir. 1983), for the proposition that other circuits had allowed the abeyance of exhausted petitions. App. A at 14, n.7. Neither case is helpful. *Burris*'s suggestion that abeyance of a petition would be permissible because similar procedures are followed in unrelated civil cases ignores the exhaustion and abuse of the writ doctrines applicable to habeas proceedings and its suggestion is contrary to those doctrines. *Thompson* was decided well before *McCleskey*, and its conclusion that a district court could "leave a habeas petition dormant on its docket" pending presentation of unexhausted claims in state court is contrary to *Rose*'s mandate that exhaustion be completed on all claims before resort to federal court.

petitions, thus *increasing* the burden on federal courts, and hence did not speak directly to that issue; nor would the Court then have thought it necessary to spell out that, if a petitioner chose to amend his petition to delete unexhausted claims, he would be expected to litigate that petition rather than have it merely take up space on the court's docket. *Rose*'s silence on what could only be deemed an absurd reading of its straightforward holding hardly warrants the approval of the blatant and manipulative contrivance employed here. While the State does not suggest that a District Court has no discretion to control its docket as a general matter, it emphatically insists that a District Court lacks discretion to hold a petition in abeyance for the purpose of avoiding the exhaustion and abuse of the writ doctrines.

As this Court explained in a related context,

> The orders by the Ninth Circuit to vacate submission of the case until completion of the state collateral proceeding and then to hold the case in abeyance pending filing and resolution of the third federal habeas proceeding in the District Court raise the very concerns regarding delay that were part of the rationale for this Court's decisions in *Rose v. Lundy*, 455 U.S. 509 (1982), and *McCleskey v. Zant*, 499 U.S. 467 (1991). Adherence to those decisions, and their prompt enforcement by the district courts and courts of appeals, will obviate in many cases what the Court of Appeals here seems to perceive to be the necessity for accommodating multiple filings.

In re Blodgett, 502 U.S. 236, 239 (1992). The Court observed that expedited review of the second petition, rather than abeyance, would have been proper. *Id.* at 239-40. It then held,

> The delay in this case demonstrates the necessity for the rule that we now make explicit. In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty to take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

Id. at 240. Manifestly, abeyance is the antithesis of prompt resolution. The District Court's violation of its duty here could not be more plain.

Aside from the violation of *Rose* and its progeny, the State raised the effect this procedural device has on the viability of the one-year statute of limitations in 28 U.S.C. § 2244(d). Although Taylor's mixed petition was filed before the Act was passed, the District Court did not rule on the State's motion to dismiss until after the Act's passage. The application of the statute of limitations was thus an issue with respect to any amendment of the petition, but one which the District Court did not resolve because *Lindh v. Murphy*, ___ U.S. ___, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), was then pending before this Court. App. B at [30-31].[5]

The issue remains significant, both for this case and the many cases in which so-called exhausted claims petitions have been filed in capital cases, accompanied by requests to hold those petitions in abeyance, a device which merely pays lip service to the filing deadline. There is little doubt that the impetus for the file-followed-by-abeyance-for-exhaustion artifice is to appear respectful of the filing deadline prescribed by the Act while indulging

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5. At oral argument before the Ninth Circuit, the State explained that the Act now applies to Taylor because his amended petition, containing only his exhausted claims, was filed on April 30, 1997, well after passage of the Act.

death row inmates' desire to pursue exhaustion of state remedies on a schedule that serves to maximize delay. Congress, however, was keenly mindful of the exhaustion requirement when enacting the deadline, and made what in *its* judgment is the *proper* accommodation. Exhaustion *tolls* the deadline, 28 U.S.C. §§ 2244(d)(2), 2263(b)(2), a feature of the law that belies any suggestion that state exhaustion, being a precondition to federal relief, would occur *after* the filing of the federal petition. Since all petitions now filed will be post-Act petitions, the procedural device employed here will also affect the statute of limitations. Petitioners who purport to meet that statute, but then ask the district court to hold their petitions in abeyance pending state court exhaustion of additional claims, defeat the very policy the limitations period was crafted to advance.[6]

The State asked the Court of Appeals to respect the simple rule of *Rose*, and to refuse to sanction a novel procedural device that undermines the holding of that case. The court declined to do so, thus increasing the burden on federal courts and disserving the values of comity and federalism that undergird the exhaustion doctrine. Both this Court's decision in *Rose* and the Congressional implementation of a statute of limitations, with its provision for tolling pending state court exhaustion, provide a fair and efficient mechanism for habeas litigants that requires the exhaustion of all claims for relief before resort to federal court. The requirement of exhaustion followed by the filing of a single petition

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6. Taylor and numerous other petitioners have argued that Rule 15, Federal Rules of Civil Procedure, allows liberal amendment and relation back of those amendments to the initial filing. Indeed, at the March 28, 1997, hearing on the State's motion for reconsideration, the District Court stated, "I think they're permitted to amend. What about Rule 15(c) and relation back?" Petition for Writ of Mandate to the Ninth Circuit, Exhibit D at 17.

should not be avoidable by the simple ruse of a procedural device that the Court of Appeals acknowledged will render the "circle . . . complete" by enabling Taylor to achieve precisely what its cases, and this Court's precedents, had previously disallowed. App. A at 18.

Permitting Later Amendment of an Abeyant Petition with Newly Exhausted Claims Violates the Abuse of the Writ Doctrine

In *Rose v. Lundy*, a plurality of this Court warned petitioners who wished to delete unexhausted claims that,

> By invoking this procedure . . . the prisoner would risk forfeiting consideration of his unexhausted claims in federal court. . . . [A] district court may dismiss subsequent petitions if it finds that "the failure of the petitioner to assert those [new] grounds in a prior petition constituted an abuse of the writ." . . . Thus a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions.

455 U.S. at 520-21. The Court's quote from *Sanders v. United States*, 373 U.S. 1, 18 (1963), is particularly instructive here.

> [I]f a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be

> true if, as in Wong Doo, the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

455 U.S. at 521 (footnote omitted).

Although *Rose* spoke in terms of a "subsequent petition" rather than an amended one, 455 U.S. at 520-21, the principle of abuse of the writ applies equally to both. Amending a federal petition with the addition of new claims achieves the same result as that obtained by presenting those claims in a new petition -- it presents the federal court with new claims for relief that were not presented in the original petition, and it results in the same piecemeal litigation and delay.

In *McCleskey v. Zant*, 499 U.S. at 490, this Court stated, "[i]n habeas, equity recognizes that 'a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.'" A petitioner who deliberately chooses to file a petition containing some claims, and who also intends to file a successive petition containing additional claims after exhaustion, is necessarily violating this Court's rule against piecemeal presentation of claims. A request for abeyance of a valid petition so that the petition may be amended in the future disentitles the petitioner to the relief he seeks in the successive petition just as it would if the first petition was adjudicated and a new, successive, petition was filed. *Cf. id.* at 498 ("Abuse-of-the-writ doctrine examines *petitioner's* conduct: The question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process . . . .") (emphasis in original); *Gomez v. United States District Court*, 503 U.S. 653, 654 (1992).

In concluding its abuse of the writ analysis in *McCleskey*, the Court stated that the history of the proceedings in that case, and the burden on the State to defend against allegations made for the first time in federal court nine years after trial, demonstrated the necessity of the abuse of the writ doctrine. *Id.* at 503. Here, the California Supreme Court affirmed in 1990 Taylor's conviction and sentence of death for the murder he committed in 1985, he has been in federal court since 1992, and he filed his first, mixed petition in 1995. He has yet to file a valid petition that he actually intends to pursue, and he wishes to further delay proceedings until he has filed a second amended petition. This case is thus far more egregious than *McCleskey*, in which the petitioner had actually prosecuted two federal habeas petitions to conclusion.

Moreover, in striking at finality, the habeas writ undermines the State's ability to articulate societal norms through criminal law. "[T]he power of a State to pass laws means little if the State cannot enforce them." *Id.* at 491; *see In re Blodgett*, 502 U.S. at 239. Similarly, the ability of the State to defend its judgments in federal court means little if the federal proceedings never come to an end. As this case exemplifies, federal proceedings that drag on for years, with defective, amended and abeyant petitions being filed, and with further amended petitions contemplated, only serve to trivialize the Great Writ.

The Court of Appeals agreed with the State that any subsequent amendment of a formerly exhausted petition to add newly exhausted claims could be barred as an abuse of the writ. App. A at 17. The court cited the plurality decision in *Rose*, 455 U.S. at 520, as well as Rule 9(b), Rules Governing Section 2254 Cases, 28 U.S.C., foll. § 2254, and *McCleskey v. Zant*, 499 U.S. at 493-96.

The court nevertheless declined to find that Taylor's contemplated amendment would constitute an abuse of the writ because it believed such a finding would be

tantamount to an advisory opinion. App. A at 17. Its determination was based on the belief that the District Court had not actually ruled that Taylor could file an amended petition, but had only "invited" him to do so, and had itself declined to issue an advisory opinion. As the State pointed out in its rehearing petition, however, the District Court's statement regarding an advisory opinion went only to the issue whether the Act applied to this case, in light of the pendency of *Lindh v. Murphy*, not whether Taylor could file an amended petition. *See* App. B at 46-47; Petition for Writ of Mandate to the Ninth Circuit, Exhibit D at 24. The District Court's order shows that it not only concluded Taylor could file an amended petition, but in fact ordered him to do so, and set a time within which the State would be required to file an answer. App. B at 39-46, 49-50.

In any event, regardless of whether the District Court had conclusively ruled that Taylor could file the amended petition, it can be determined at this stage that the anticipated amendment will constitute an abuse of the writ. Taylor has known of his unexhausted claims since at least July 1995. Having acknowledged the presence of unexhausted claims and predicated his request for a stay and abeyance on their existence, Taylor has admitted that he cannot meet the standard for excusing his failure to raise the claims at the appropriate time that this Court articulated in *McCleskey v. Zant*, 499 U.S. at 493.[7]

Having already filed his initial, mixed petition, Taylor was limited, under *Rose*, to only two options: (1) refile his petition containing only those claims he had exhausted, which could then be litigated, or (2) suffer dismissal of his mixed petition, and then attempt exhaustion of all his remaining claims in state court so that he could file *one*

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7. Any petitioner who files an "exhausted claims" petition with a request to hold the petition in abeyance pending exhaustion of additional claims will be in the same situation.

fully exhausted petition. He chose to do neither, and instead asked the District Court to allow piecemeal presentation of his claims by the filing of multiple petitions.

The District Court's grant of Taylor's request to hold the amended, "exhausted" claims petition in abeyance, so that he might later amend it with his newly exhausted claims, must be reversed. Having now filed the amended petition containing exhausted claims, Taylor must pursue it. Any contemplated further amendment with additional claims following exhaustion constitutes an abuse of the writ on its face, and that finding need not await what will inevitably be a futile exercise.

Since the ultimate objective of the abeyance procedure is impermissible, it cannot supply its justification. Petitioners who file petitions containing their exhausted claims are obligated to pursue them. The abeyance artifice that petitioners have sought violates the exhaustion and abuse of the writ doctrines. The district courts' allowance of this contrivance constitutes an invalid exercise of judicial power.

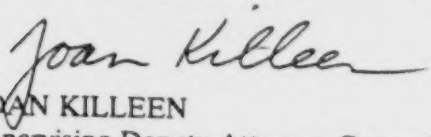
CONCLUSION

For the reasons stated, the State respectfully asks that the petition for writ of certiorari be granted.

Dated: May 12, 1998.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
DANE R. GILLETTE
Senior Assistant Attorney General
RONALD S. MATTHIAS
Supervising Deputy Attorney General



JOAN KILLEEN
Supervising Deputy Attorney General
Counsel of Record

Counsel for Petitioner

JK:ds
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Supreme Court, U.S.
FILED

No. --97 1841 MAY 14 1998

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

v.

FREDDIE LEE TAYLOR, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
DANE R. GILLETTE
Senior Assistant Attorney General
RONALD S. MATTHIAS
Supervising Deputy Attorney General
JOAN KILLEEN
Supervising Deputy Attorney General
Counsel of Record
50 Fremont St., Room 300
San Francisco, CA 94105
Telephone: (415) 356-6193
Counsel for Petitioner

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTHUR CALDERON, Warden,
California State Prison,
San Quentin,
Petitioner,

v.

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA,
Respondent,

FREDDIE LEE TAYLOR,
Real Party in Interest.

No. 97-70567

D.C. No. C 92-1627-MHP

OPINION

PETITION FOR WRIT OF MANDAMUS TO
THE UNITED STATES DISTRICT COURT
FOR THE NOTHERN DISTRICT OF CALIFORNIA

Argued and Submitted
November 25, 1997--San Francisco, California

Filed January 26, 1998

Before: Jerome Farris, Diarmuid F. O'Scannlain, and Michael Daly Hawkins, Circuit Judges

Opinion by Judge O'Scannlain

COUNSEL

Joan Killeen, Supervising Deputy Attorney General, San Francisco, California, for the petitioner.

Nanci L. Clarence, Clarence & Snell, San Francisco, California, for the real party in interest.

OPINION

O'SCANNLAIN, Circuit Judge:

We are asked to decide whether a district court may allow a habeas corpus petitioner to amend his petition to delete unexhausted claims and hold the amended petition in abeyance subject to further amendment reincorporating the deleted claims once they are litigated in state court.

I

The real party in interest in this case, Freddie Lee Taylor, is a California prisoner sentenced to death for first degree murder. On July 10, 1995, Taylor filed a petition for a writ of habeas corpus in the District Court for the Northern District of California raising some forty-six separate claims, many of which were unexhausted. The State moved to dismiss the petition. The district court, Judge Marilyn Hall Patel presiding,[1] initially ruled that

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1. Subsequent to the issuance of the order that is the subject of

it would stay rather than dismiss the petition pending exhaustion in California state court. The State moved for reconsideration in light of several intervening Ninth Circuit cases holding that district courts may not stay "mixed" habeas petitions (petitions containing both exhausted and unexhausted claims), *see Greenawalt v. Stewart*, 105 F.3d 1268 (9th Cir.), *cert. denied*, 117 S.Ct. 794 (1997), *Calderon v. United States District Court (Gordon)*, 107 F.3d 756 (9th Cir.), *cert. denied*, 118 S.Ct. 265 (1997), and *Reutter v. Crandel*, 109 F.3d 575 (9th Cir.), *cert. denied*, 118 S.Ct. 142 (1997).

On April 1, 1997, the district court issued a lengthy written order and held that it would allow Taylor to amend his original petition to delete the unexhausted claims and would hold in abeyance the amended petition while Taylor exhausted the deleted claims in state court. The district court also invited Taylor to file a second amended petition incorporating the newly exhausted claims after litigating them in the California courts.

In accordance with the district court's order, Taylor deleted the unexhausted claims from his original petition and filed his "First Amended Petition for Writ of Habeas Corpus" on April 30, 1997.

The State now petitions this court, pursuant to 28 U.S.C. § 1651(a)[2/] and Federal Rule of Appellate Procedure 21, for a writ of mandamus or, in the alternative, a writ of prohibition, directing the district

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the government's petition, Judge Patel was elevated to the post of Chief Judge of the Northern District.

2. The All Writs Act, 28 U.S.C. § 1651(a), provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

court to vacate the portion of its order holding in abeyance Taylor's amended petition pending his exhaustion of previously unexhausted claims in state court. The State argues that the district court's order circumvents the spirit, if not the letter, of the Supreme Court's decision in *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), and this court's recent holdings in *Greenawalt*, 105 F.3d 1268, *Gordon*, 107 F.3d 756, and *Reutter*, 109 F.3d 575.

The legitimacy of the district court's self-titled "procedural device of withdrawal and abeyance" presents an important and difficult question of first impression in this circuit.

II

[1] The Supreme Court has declared that "[t]he supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power'...." *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383, 74 S.Ct. 145, 148, 98 L.Ed. 106 (1953); *see also Kerr v. United States District Court*, 426 U.S. 394, 402, 96 S.Ct. 2119, 2123, 48 L.Ed.2d 725 (1976) ("The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.").[3] In an effort to implement that command,

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3. The writ of prohibition is the "fraternal twin" of its more familiar sibling, the writ of mandamus. *See* Richard H. Fallon, Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 1668 (4th ed.1996). The two are evaluated under an identical standard. *See Guam v. District Court of Guam*, 641 F.2d 816, 820 (9th Cir. 1981) ("The writs of mandamus and prohibition are drastic remedies, to be used only in extraordinary situations.").

this court has adopted a five-part standard to govern the issuance of writs of mandamus:

> The guidelines are: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he desires; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests persistent disregard for the federal rules; and (5) whether the district court's order raises new and important problems or issues of law of first impression.

In re Cement Antitrust Litigation, 688 F.2d 1297, 1301 (9th Cir.1982), *aff'd, Arizona v. United States District Court*, 459 U.S. 1191, 103 S.Ct. 1173, 75 L.Ed.2d 425 (1983). "[R]arely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is applicable. The considerations are cumulative and proper disposition will often require a balancing of conflicting indicators." *Bauman v. United States District Court (Union Oil)*, 557 F.2d 650, 655 (9th Cir.1977).[4] However, although all five factors need not be satisfied in order for mandamus to issue, "it is clear that the third factor, the existence of clear error as a matter of law, is dispositive." *Executive Software North America, Inc. v. United States District Court (Page)*, 24 F.3d 1545, 1551 (9th Cir.1994).

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4. For instance, the final two factors, by definition, generally do not coexist: "[T]he fourth contemplates a case presenting an oft-repeated error, and the fifth a case presenting a novel question. Where one of the two is present, the absence of the other is of little or no significance." *United States v. Harper*, 729 F.2d 1216, 1222 (9th Cir.1984). In this case, we are concerned with the fifth factor, and not the fourth.

[2] The State contends (and Taylor does not seriously dispute) that the first two factors of the *Cement* standard are satisfied because the State effectively has no alternative procedural mechanism, such as direct appeal, by which timely to vindicate its interests, in light of the fact that the violation alleged in its petition--the circumvention of the "total exhaustion" requirement--will be complete at the moment the district court exercises jurisdiction. Similarly, the State contends (and Taylor does not seriously dispute) that the fifth factor is present, because the district court's order represents what appears to be the first attempt in this circuit to implement the "withdrawal-and- abeyance" procedure. Consequently, the parties appear to agree on one thing: the propriety of mandamus in this case turns predominantly, if not exclusively, upon the satisfaction of the third *Cement* factor.

[3] In determining whether the third factor is satisfied, we recognize that a lesser showing is required in so-called "supervisory mandamus" cases, "where the petition raises an important question of law of first impression, the answer to which would have a substantial impact on the administration of the district courts." *Cement*, 688 F.2d at 1307. In such cases--one of which the instant case certainly seems to be--mandamus may issue upon a showing of ordinary (as opposed to clear) error:

> [I]n supervisory mandamus cases involving questions of law of major importance to the administration of the district courts ... we see no legitimate reason for refraining from exercising our supervisory authority where we can determine that an error has been made but cannot, for whatever reason, characterize the error as "clearly" erroneous.
> . . . Moreover, [where a] petition represents a question of law of first impression, the resolution of which

> would have a substantial effect on the orderly and efficient administration of the courts, we might issue the writ even were we simply to conclude that the district court was in error.

Id.

[4] With regard to the all-important third factor, both parties rest their mandamus arguments on their respective positions as to the merits of the district court's action, and argue that the court's order was--or was not, as the case may be--erroneous as a matter of law. Consequently, the mandamus issue in this case is inextricably tied to the substantive question whether the district court's "withdrawal-and-abeyance" procedure was a valid exercise of that court's discretion. If we conclude that the district court's order was proper, then mandamus is, by definition, an inappropriate remedy. If, however, we conclude that the district court's order was contrary to settled law, then under the lower standard applicable in supervisory mandamus situations, mandamus will lie. We therefore turn, without further delay, to the merits of the State's petition.

III

A

[5] The "exhaustion" doctrine has long been one of the pillars of federal habeas corpus jurisprudence. *See, e.g., United States ex rel. Kennedy v. Tyler*, 269 U.S. 13, 17-19, 46 S.Ct. 1, 2-3, 70 L.Ed. 138 (1925); *Ex Parte Royall*, 117 U.S. 241, 251, 6 S.Ct. 734, 740, 29 L.Ed. 868 (1886). Under the present-day codification of that doctrine, habeas relief is not available "unless it appears that the applicant has exhausted the remedies available in the courts of the State. . . ." 28 U.S.C. § 2254(b)(1)(A).

In *Rose v. Lundy*, 455 U.S. 509 (1982), the Supreme Court addressed for the first time the proper method for disposing of habeas petitions containing both exhausted and unexhausted claims. The Court adopted a rule of "total exhaustion" and directed that "a district court must dismiss such 'mixed petitions,' leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." *Id.* at 510.

Unfortunately, not all lower courts took the Court's ruling in *Rose* in stride. Subsequent to *Rose*, in *Neuschafer v. Whitley*, 860 F.2d 1470 (9th Cir.1988), this court proposed an "alternative" procedure for dealing with mixed petitions (a procedure that was, quite frankly, in stark conflict with the central teaching of *Rose*). The *Neuschafer* court suggested in a footnote that "[w]hen a petitioner has not exhausted his state remedies before filing a federal habeas petition, a district court may hold the [mixed] federal petition in abeyance, issue a stay of execution, and allow the petitioner an opportunity to exhaust his state remedies." *Id.* at 1472 n. 1.

On the heels of *Neuschafer* (and in the face of *Rose*), the Ninth Circuit's Death Penalty Task Force promulgated model local rules for the district courts. One of these rules, adopted by the Northern District of California, was Local Rule 296, which specifically codified a *Neuschafer*-like "stay-and-abeyance" procedure for mixed petitions:

> If the petition indicates that there are unexhausted claims for which a state court remedy is still available, petitioner will be granted a sixty (60) day stay of execution in which to seek a further stay from the state court in order to litigate the unexhausted claims in state court. During

> proceedings in state court, the proceedings on the petition will be stayed. After state court proceedings have been completed, petitioner may amend the petition with respect to the newly exhausted claims.

L.R. 296-8(e).

In a trio of recent cases, this court has, at long last, made it manifestly clear that both the *Neuschafer* dictum and Local Rule 296-8(e) are inconsistent with the mandate of *Rose*, and that the "stay-and-abeyance" procedure for mixed petitions that they begot will no longer be considered a valid exercise of judicial power. In *Greenawalt v. Stewart*, 105 F.3d 1268 (9th Cir.), *cert. denied*, 117 S.Ct. 1794 (1997), the court rejected an argument that the district court had abused its discretion in dismissing, rather than staying, a mixed petition, and explicitly refused to follow the *Neuschafer* court's dictum:

> First, [petitioner] argues that the district court abused its discretion by dismissing his preliminary petition instead of staying it while he exhausted his claims in state court. [Petitioner] concedes, however, that his preliminary petition contained an unexhausted claim. . . . The Supreme Court repeatedly has instructed the district courts to dismiss "mixed" petitions containing any unexhausted claims.

Id. at 1273. The *Greenawalt* court's conclusion was echoed in *Calderon v. United States District Court (Gordon)*, 107 F.3d 756 (9th Cir.), *cert. denied*, 118 S.Ct. 265 (1997). Noting that "[t]he district court [had] reached its erroneous conclusion by relying on our opinion in *Neuschafer v. Whitley*," the court stated:

> We first hold that the district court erroneously stated . . . that dismissal of mixed habeas petitions, as required by *Rose v. Lundy*, "is not the rule in the Ninth Circuit." Because [petitioner's] amended habeas corpus petition undisputedly contained unexhausted state claims, dismissal of the federal petition was required.

Id. at 760 (internal citation omitted). Finally, in *Reutter v. Crandel*, 109 F.3d 575 (9th Cir.), *cert. denied*, 118 S.Ct. 142 (1997), the court ruled that "[t]he unexhausted first federal claim . . . prevents consideration of [the prisoner's] petition. The petition is mixed and so requires dismissal. [The prisoner] may strike the unexhausted claim and resubmit his petition to the district court." *Id.* at 578 (internal citation omitted).[5]

In light of *Greenawalt*, *Gordon*, and *Reutter*, the district court in its April 1, 1997 order candidly conceded that "the rule in the Ninth Circuit is now that a mixed petition must be dismissed or the unexhausted claims stricken."

B

The district court discovered a relatively simple way around the *Greenawalt-Gordon-Reutter* proscription against holding mixed petitions in abeyance pending exhaustion in state court. In fact, all told, the procedure the district court followed involved only three essential

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5. Other circuits similarly disallow the holding in abeyance of mixed habeas petitions. *See, e.g., Christy v. Horn*, 115 F.3d 201 (3d Cir.1997); *Victor v. Hopkins*, 90 F.3d 276 (8th Cir.1996), *cert. denied*, 117 S.Ct. 1091 (1997).

steps: *first*, it allowed Taylor to amend his mixed petition to delete the unexhausted claims; *second*, it stayed and held in abeyance the amended, fully exhausted petition pending Taylor's exhaustion of the previously unexhausted claims in California state court; and *third*, it suggested that it would allow Taylor to amend his petition for a second time after litigating his claims in state court in order to fold the newly exhausted claims back into his original habeas petition.

The State insists that, viewed holistically, the district court's "withdrawal-and-abeyance" procedure is merely a "subterfuge"--an end run around the exhaustion and abuse-of-the-writ principles, the very principles that recent Supreme Court and Ninth Circuit cases have attempted to fortify, *see, e.g., McCleskey v. Zant*, 499 U.S. 467 (1991); *Rose*, 455 U.S. 509; *Greenawalt*, 105 F.3d 1268. The district court, the State complains, essentially "allowed Taylor to follow the identical procedure that he would have followed under the local rule, except that the stayed petition is an exhausted one rather than a mixed one. It defeats the purposes of the exhaustion and abuse of the writ doctrines just as effectively as if the petition was mixed, however." Petition for Writ of Mandate, or in the Alternative, for Writ of Prohibition at 22 (hereinafter "Petition"). The State argues that "[b]y employing this technique, the district court circumvent[ed] the rulings of *Rose*, *Greenawalt*, and *Gordon* and effectively allow[ed] itself to be used 'merely as a jurisdictional parking lot.' " Petition at 32 (quoting *Sterling v. Scott*, 57 F.3d 451, 454 (5th Cir.1995), *cert. denied*, 116 S.Ct. 715 (1996)). Petition at 32.

The State raises some rather serious allegations. We must therefore carefully scrutinize each step of the district court's order--amendment, abeyance, and

re-amendment--to determine its consistency with established law.

1

[6] The State does not question the district court's authority to permit Taylor to amend his original petition by deleting the unexhausted claims. Nor could it. The Supreme Court in *Rose* specifically provided habeas petitioners with the option of amending their applications to delete unexhausted claims rather than suffering a dismissal, *see Rose*, 455 U.S. at 520 ("[The petitioner] can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims."), and the rule of *Rose* allowing amendment is well-supported by Ninth Circuit precedent, *see, e.g., Reutter*, 109 F.3d at 578 ("[Petitioner] may strike the unexhausted claim and resubmit his petition to the district court."). Moreover, as the district court concluded, Federal Rule of Civil Procedure 15(a) also required that it give Taylor an opportunity to amend his petition.[6] Because the State had not yet filed its "responsive pleading" at the time Taylor sought leave to amend, Taylor had the right, in accordance with Rule 15(a), "to amend [his] pleading once as a matter of course. . . ." Fed.R.Civ.P. 15(a).

2

The State focuses its critique upon the second step of the district court's analysis. Although Taylor is entitled

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6. Rule 15(a) applies to habeas corpus actions with the same force that it applies to garden-variety civil cases. *See* 28 U.S.C. § 2242 (providing that habeas petitions "may be amended or supplemented as provided in the rules of procedure applicable to civil actions"); *see also Withrow v. Williams*, 507 U.S. 680, 696 n. 7 (1993).

to delete the unexhausted claims from his petition rather than suffer a dismissal, he is *not* entitled, the State contends, to have his amended petition held in abeyance pending exhaustion; rather, the State insists, it is at liberty to litigate the exhausted claims "forthwith." Petition at 23.

In making its anti-abeyance argument, the State takes great pains to distinguish Taylor's case from *Fetterly v. Paskett*, 997 F.2d 1295 (9th Cir.1993). In *Fetterly*, several months after a habeas petitioner had filed a fully exhausted petition in federal district court, his newly-appointed attorney discovered a new claim, one that had not previously been asserted in state proceedings. *See id.* at 1297. In light of his discovery, he requested that the district court stay the habeas proceedings while he exhausted the newly identified claim in state court. *See id.* at 1297-98. The district court, however, refused to grant the stay. *See id.* at 1298. On appeal, this court concluded that the district court's refusal constituted an abuse of discretion. Under the unique circumstances of that case, the court held, the district court was not only permitted, but required, to stay proceedings on the exhausted petition pending exhaustion in state court. *See id.* at 1301.

The State contends--and indeed the district court concluded--that *Fetterly* is not squarely applicable to Taylor's petition because, unlike the petitioner in *Fetterly*, "Taylor was aware of his unexhausted claims before he filed his federal petition." Petition at 28 (emphasis in original). We agree. However, the fact that the district court was not *required*, under *Fetterly*, to hold Taylor's exhausted petition in abeyance does not necessarily imply that the district court was without *discretion* to do so. Indeed, there is language in *Greenawalt* suggesting that district courts do indeed have the authority to take such a step. In distinguishing *Fetterly*, the *Greenawalt* court pointed to the fact that whereas it dealt with a mixed

petition (which, under *Rose*, it was required to dismiss), the *Fetterly* court dealt with a fully exhausted petition (over which the district court legitimately had jurisdiction). Simply put, *Fetterly* was correctly decided, the *Greenawalt* court concluded, because "[a] district court has discretion to stay a petition which it may validly consider on the merits." *Greenawalt*, 105 F.3d at 1274.[7] Invoking that very passage from the *Greenawalt* decision, the district court held that once the unexhausted claims "are removed from the petition here, this court could consider it on the merits; therefore the court may stay it."[8]

The State suggests that the language in *Greenawalt* upon which Taylor relies should be strictly limited to the unique situation presented in *Fetterly*, namely, in which a *new* lawyer discovers *new*, previously unexhausted claims. At least on its face, however, the disputed language

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7. Other circuits endorse similar rules and permit the staying of fully exhausted petitions. *See, e.g.*, *Burris v. Farley*, 51 F.3d 655, 658-59 (7th Cir.1995) (suggesting that it would be permissible for a habeas petitioner to "fil[e] a petition raising all exhausted issues and ask [ ] the court for a stay until the remaining issues have been exhausted"); *Thompson v. Wainwright*, 714 F.2d 1495, 1498 (11th Cir.1983) ("[A] district court having before it a habeas petition containing only exhausted claims may continue the case at the petitioner's request pending his presenting to the state courts other claims that are not included in the petition and have not been exhausted.").

8. The district court found that a number of factors counseled in favor of its exercising its discretion to grant the stay: (1) in filing a mixed petition in the first instance, Taylor had relied in good faith on Local Rule 296-8(e), which was still valid prior to the recent decisions in *Greenawalt*, *Gordon*, and *Reutter*; (2) if the district court denied the stay, then Taylor would have to abandon temporarily the unexhausted claims and litigate them in a subsequent petition, resulting in piecemeal litigation; and (3) Taylor did not appear to have sought the stay "to delay, to vex, or to harass."

betrays no such limitation. Although the *Greenawalt* court did indeed cite *Fetterly* as an instance of legitimate petition-staying, the context in which the court spoke indicates that it intended, by invoking *Fetterly*, to draw a bright line between the staying of fully exhausted petitions, which it deemed appropriate, and of mixed petitions, which it deemed inappropriate:

> In *Fetterly*, we held that a district court should have stayed, rather than dismissed, a valid habeas corpus petition containing only exhausted claims to give the petitioner time to exhaust several newly-discovered claims in state court. *A district court has discretion to stay a petition which it may validly consider on the merits. But Greenawalt argues that the district court should have stayed a petition which, under* Rose, *it was obliged to dismiss immediately. Fetterly does not support that proposition.*

Greenawalt, 105 F.3d at 1274 (internal citations omitted) (emphasis added).[9]

[7] When pressed at oral argument, the State was unable to muster any specific support for its assertion that

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9. Ironically, in its original motion for reconsideration, filed before the specter of amendment or deletion had surfaced (and, consequently, at a time when Taylor's petition was still mixed and the State's litigation strategy was understandably somewhat different), the State appeared to cite the *Greenawalt* passage for the very proposition that it now seeks to deny: exhausted petitions may be stayed, mixed petitions may not--*period*. Not surprisingly, in the wake of the district court's decision to permit amendment--rendering Taylor's petition exhausted rather than mixed--the State abandoned its original interpretation of the *Greenawalt* language in favor of the more limited construction it now submits. Unfortunately for the State, we believe that its original interpretation--the interpretation now urged by Taylor--is the more natural one.

district courts do not have discretion to stay fully exhausted petitions and that habeas petitioners who amend their applications to delete unexhausted claims must proceed immediately upon the exhausted ones. In response to the question whether it had "any authority that says a district court does not have the discretion to stay a petition containing only exhausted claims," the State frankly conceded that it did "not have specific authority that the district court has no such authority to do that."[10] In light of *Greenawalt*--which on its face certainly appears to confer power upon district courts to stay fully exhausted petitions--and the State's inability to cite to the panel any contrary authority, we cannot say that the district court erred in holding Taylor's amended, exhausted habeas petition in abeyance.[11]

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10. In its opening remarks during oral argument, the State suggested that *Rose* itself required that habeas petitioners who choose to amend their petitions to excise unexhausted claims must proceed immediately on the exhausted claims that remained: "[Under *Rose*,] the petitioner may . . . resubmit the petition containing exhausted claims. If he does that, he must proceed on the exhausted claims." As the cited colloquy indicates, however, the State eventually backed away from that position. And rightly so. Although the Supreme Court referred on three separate occasions in *Rose* to the dismissal and amendment options available to habeas petitioners who submit mixed petitions, the Court did not, as the State originally suggested, intimate that those petitioners who opted for amendment were required to proceed posthaste on their remaining claims. *See Rose*, 455 U.S. at 510; *id.* at 520-21.

The State also urged at one point during its argument that "*Greenawalt* says you cannot get a stay." *Greenawalt* did, as we have seen, hold that district courts may not stay a mixed petition; however, as we have also seen, contrary to the State's position, the *Greenawalt* court concluded that district courts do possess the authority to stay fully exhausted petitions.

11. We emphasize that our decision in no way grants district courts carte blanche to stay even fully exhausted habeas petitions. We can, of course, imagine situations in which a district court might

[8] Finally, the State challenges that portion of the district court's order specifically directing that "[u]pon completion of state proceedings, petitioner shall file a second amended petition" folding into the abeyant petition the newly exhausted claims. The State contends that any "subsequent amendment of a formerly exhausted petition to add newly exhausted claims . . . could be barred as an abuse of the writ." Petition at 24. On that score, the State is clearly correct. In *Rose*, the Supreme Court explicitly warned habeas petitioners that, if they opted to amend rather than to take a dismissal, they "risk[ed] forfeiting consideration of [their] unexhausted claims in federal court" under abuse-of-the-writ principles. *Rose*, 455 U.S. at 520; *see also* Rules Governing Section 2254 Cases, Rule 9(b); *McCleskey*, 499 U.S. at 493-96. Indeed, Taylor candidly conceded at oral argument that his anticipated attempt to re-amend his petition to add previously unexhausted claims will be subject to an abuse-of-the-writ challenge.

[9] The State's challenge to the "re-amendment" portion of the district court's order, however, is premature. Although the district court invited Taylor to file a second amended petition after exhausting his previously unexhausted claims in the California system, it did not indicate how it would ultimately rule on such motion. In fact, in its oral ruling, the district court specifically declined to express an opinion on the

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be found to have abused the very discretion that *Greenawalt* appears to afford. It could not, for instance, stay habeas proceedings indefinitely pending exhaustion in state court, nor could it hold in abeyance the application of a petitioner who merely sought to stall the habeas corpus process. This, however, is not such a case; there was no abuse of discretion here. *See supra* note 8.

re-amendment issue, believing that to do so "would be advisory at best." The State itself acknowledged at oral argument that "we are not at that point yet because [Taylor] ha[s] not come back with the [second] amended petition." We agree with the district court that any ruling as to the legitimacy of a step not yet taken would be tantamount to an advisory opinion. We therefore do not reach the issue.

IV

[10] There is, we must concede, much force to the State's position. We understand the State's frustration. If the district court allows Taylor--as it has suggested it might--further to amend his abeyant petition to add previously unexhausted claims, the circle will indeed be complete. Taylor will have successfully achieved precisely what *Greenawalt*, *Gordon*, and *Reutter* forbid: the staying and holding in abeyance of a habeas petition that, at least when it came through the courthouse door, contained both exhausted and unexhausted claims. Unfortunately, however, on mandamus review, frustration is not enough. Rather, the mandamus petitioner must isolate and distinctly articulate the precise legal error that the offending official committed. The State has not discharged that burden in this case. This case is not about whether or not the rule articulated in *Greenawalt* allowing district courts to hold fully exhausted petitions in abeyance is a good rule, or whether that rule might on occasion spawn mischief. Rather, our jurisdiction is limited to determining whether or not the district court followed the *Greenawalt* rule *as articulated*. Consequently, notwithstanding any substantive concerns regarding the "withdrawal-and-abeyance" procedure that we might have, we are simply unable--even under the lower standard applicable in supervisory mandamus cases--to issue the writ to the district court at this time. The petition for a writ of mandamus is **DENIED**.

FILED
APRIL 1, 1997
RICHARD WEIKING
CLERK
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

FREDDIE LEE TAYLOR,
Petitioner,

v.

ARTHUR CALDERON, in his
capacity as Warden of California
State Prison at San Quentin,
Respondent.

No. C 92-1627 MHP

ORDER RE: MOTION FOR
RECONSIDERATION

DEATH PENALTY CASE

INTRODUCTION

Petitioner Freddie Lee Taylor is a California prisoner sentenced to death. Presently before the court is respondent's Motion for Reconsideration of this court's October 20, 1995, oral rulings regarding respondent's

motion to compel exhaustion and petitioner's countermotion for discovery. The court must decide the proper disposition of the mixed petition in light of the Ninth Circuit's recent decisions in *Greenawalt v. Stewart*, 105 F.3d 1268 (9th Cir. 1997), and *Calderon v. U.S.D.C. (Gordon)*, ___ F.3d ___, 1197 W.L. 71765 (9th Cir., Feb. 21, 1997). The court also must decide whether any discovery is permissible at this stage of the proceedings under *Calderon v. U.S.D.C. (Nicolaus)*, 98 F.3d 1102 (9th Cir. 1996).

A hearing was held on March 28, 1997, at 10:30 a.m. Upon consideration of the briefs and arguments of the parties, the court enters the following memorandum and order.

BACKGROUND

The California Supreme Court affirmed petitioner's first degree murder conviction and death sentence in December 1990. *People v. Taylor*, 52 Cal.3d 719 (1990). It denied his petition for habeas corpus in September 1990. Petitioner then sought appointment of counsel and a stay of execution from this court. The court appointed counsel in 1992, and on June 30, 1995, stayed petitioner's execution pending final disposition of the case. Petitioner filed his Petition for Writ of Habeas Corpus raising 20 claims on July 10, 1995.

Respondent filed a motion on August 14, 1995, to dismiss the petition or, in the alternative, to compel exhaustion. Petitioner then filed a counter-motion for discovery. The court held a hearing on these motions on October 20, 1995. At the hearing, the court announced its oral rulings. The court stated that it would: (1) issue a tentative ruling identifying the unexhausted claims, and give petitioner (but not respondent) an opportunity to

respond to that ruling; (2) DENY the motion to dismiss the petition, and instead hold the petition in abeyance while petitioner exhausts his unexhausted claims under Local Rule 296-8(e); and (3) GRANT the requested discovery in part. To date, no written ruling has issued.

Since the hearing, three major developments have reshaped the law under which the court must consider the exhaustion and discovery issues. First, in October 1996, the Ninth Circuit held in *Calderon v. U.S.D.C. (Nicolaus)*, 98 F.3d 1102 (9th Cir. 1996), that discovery is not available in a habeas action prior to the filing of the finalized petition. The court also suggested that discovery on unexhausted claims is impermissible.

Second, on April 24, 1996, President Clinton signed into law the 1996 Antiterrorism and Effective Death Penalty Act (Pub. L. 104-132, 110 Stat. 1214) (the Act). The Act enacts a one-year statute of limitations for all federal habeas petitions filed by state prisoners. 28 U.S.C. § 2244(d). However, in December 1996, the Ninth Circuit held in *Jeffries v. Wood*, 103 F.3d 827 (1996), that the Act's amendments to Chapter 153 of Title 28 of the U.S. Code, which includes § 2244(d), do not apply to "cases filed" in the federal courts of this circuit before the Act's enactment.[1/]

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1. The Act also created a new Chapter 154 (§§ 2262-2266) to Title 28 of the United States Code. This chapter establishes procedures applicable only in capital habeas cases under 28 U.S.C. § 2254, and only when a state "opts in" by establishing that it has met the criteria in the Act. Congress expressly provided that Chapter 154 shall apply to cases pending on or after the date of the Act. In *Ashmus v. Calderon*, No. 96-1533 TEH, however, the court enjoined application of this chapter in California. (*See* order of June 14, 1996.) That order is on appeal.

Third, on January 17 and February 21, 1997, the Ninth Circuit issued its decisions in *Greenawalt* and *Gordon*. Those decisions cast doubt upon the continuing validity of the abeyance procedure of Local Rule 296-8(e).

Accordingly, on February 4, 1997, respondent filed a Motion for Reconsideration of Court's Oral Ruling and Alternative Motion for Issuance of Written Ruling on Respondent's Motion to Dismiss Petition. Respondent asks the court to: (1) reconsider its oral ruling denying respondent's original motion to dismiss the petition for lack of exhaustion, and instead to dismiss it in light of *Greenawalt* and *Gordon*; and (2) to reconsider its oral ruling granting petitioner post-petition discovery on his unexhausted claims and instead, to deny the motion under *Nicolaus*. Petitioner filed an opposition to the motion on February 21, 1997, and respondent replied on February 28, 1997. On March 21, 1997, petitioner filed a Declaration of Nanci Clarence in support of petitioner's equitable tolling request.

DISCUSSION

A. General Contentions[2/]

Respondent contends that in light of *Greenawalt* and *Gordon* this court must dismiss the pending "mixed" petition because it contains unexhausted claims. If the court permits petitioner to withdraw the unexhausted

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2. As a preliminary matter, the court notes that respondent's motion for reconsideration is procedurally improper. Respondent has not complied Local Rule 7-9, which requires leave of court to file such a motion. However, petitioner does not object to the motion on this ground. Petitioner has responded on the merits, and the motion is fully briefed and argued. Accordingly, the court will overlook the procedural lapse and consider the motion on the merits.

claims, respondent argues it has no authority to hold the fully exhausted petition in abeyance while petitioner exhausts the unexhausted claims.

Respondent further contends that, because the court must dismiss the petition, it has no authority to grant discovery under *Nicolaus*. Even if the court retains jurisdiction over part of the petition, respondent urges the court to deny discovery because all the discovery sought goes to unexhausted claims.

Petitioner first contends that *Greenawalt* is factually distinguishable from this case and does not compel the court to dismiss the pending petition. Even if *Greenawalt* is binding, petitioner argues that applying it to dismiss the petition here would be impermissibly retroactive and deny him due process.

Even if the court finds applying *Greenawalt* would not deny him due process, petitioner argues that, rather than dismissing the petition, the court must permit him to amend the petition to delete the unexhausted claims. The court may then hold the fully exhausted petition in abeyance while he exhausts the unexhausted claims under *Fetterly v. Paskett*, 997 F.2d 1295 (9th Cir. 1993).

If the court follows this procedure, petitioner asks the court to declare the statute of limitations of 28 U.S.C. § 2244(d) equitably tolled as to the unexhausted claims on two grounds: (1) this court's delay in ruling on respondent's motion to compel exhaustion; and (2) the disruption in preparation of the exhaustion petition created by the unexpected death of one of petitioner's counsel.

Finally, petitioner contends that *Nicolaus* does not compel the court to reconsider its discovery rulings

because: (1) the court has authorized *post*-petition discovery, not *pre*-petition discovery; and (2) the discovery sought goes to exhausted claims.

B. Exhaustion

(1) Identifying Unexhausted Claims

(a) Legal Framework

A federal court may not grant habeas relief until the petitioner has exhausted available state remedies with respect to each claim. 28 U.S.C. § 2254(b); *Gray v. Netherland*, 116 S.Ct 2074, 2081-82 (1996); *Picard v. Connor*, 404 U.S. 270 (1971). Exhaustion doctrine rests on principles of comity and federalism. *Rose v. Lundy*, 455 U.S. 509, 515 (1982). Exhaustion is required to: (1) protect the state court's role in the enforcement of federal law; (2) prevent disruption of state court proceedings; and (3) reduce piecemeal litigation. *Id*. at 518-20.

The exhaustion requirement is satisfied when a claim has been "fairly presented" to the highest state court and that court has had a meaningful opportunity to apply controlling legal principles to the facts underlying the claim. *Vasquez v. Hillery*, 474 U.S. 254, 257 (1986); *Picard*, 404 U.S. at 276-77; *Anderson v. Harless*, 459 U.S. 4, 7 (1982); *Middleton v. Cupp*, 768 F.2d 1083, 1086 (9th Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986). Once a claim has been fairly presented, it is exhausted, even if the state court's decision did not expressly address it. *See Smith v. Digmon*, 434 U.S. 332, 333 (1978); *Beam v. Paskett*, 3 F.3d 1301, 1305-06 (9th Cir. 1993).

A claim has been "fairly presented" if the petitioner described in state court both the legal theories and the operative facts on which he bases the claim.

Picard, 404 U.S. at 277-78; *see Crotts v. Smith*, 73 F.3d 861, 865 (9th Cir. 1995). To fairly present the legal theory of a claim, a petitioner must alert the state court that he is asserting a *federal* constitutional claim, either by citing the constitutional provision on which he relies or otherwise advising the court of the claim's federal basis. *Duncan v. Henry*, 115 S.Ct. 887, 888 (1995); *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996).

The factual basis of a claim has been fairly presented as long as the facts alleged in federal court do not fundamentally alter the nature of the claim [*see Hillery*, 474 U.S. at 260; *Chacon v. Wood*, 36 F.3d 1459, 1468 (9th Cir. 19940], place the claim in a "significantly different and stronger evidentiary posture" than it was when the state courts considered it, or "substantially improve[] the evidentiary basis" of the claim. *Aiken v. Spalding*, 841 F.2d 881, 883 (9th Cir. 1988). Generally, a petitioner may add factual materials supportive of those already in the record without fundamentally altering his claim and rendering it unexhausted. *See Hillery*, 474 U.S. at 260 (statistical analyses of facts already in record do not render claim unexhausted).

(b) Analysis

The federal habeas petition includes 20 claims, several of which have numerous subclaims. Respondent argues that 38 of these claims and subclaims are partially or completely unexhausted,[3/] and eight are exhausted.[4/]

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3. I, II, III, IV, V, VI, VII, VIII, IX.A, IX.B, IX.C, IX.D, IX.E, IX.F, IX.G, IX.H, IX.I, IX.J, IX.K, XI, XII.A, XII.B, XII.C, XII.D, XII.E, XIII, XIV, XV.A, XVI.A, XVI.B, XVI.C, XVI.D, XVI.E, XVI.F, XVI.L, XVIII, XIX and XX. The claim numbers refer to the claims as stated in the federal habeas petition.

4. X, XV.B, XVI.G, XVI.H, XVI.I, XVI.J, XV.K and XVII.

The court agrees that many of the claims are unexhausted. After reviewing the federal habeas petition, the opening brief on direct appeal and the state habeas petition, the court concludes that petitioner did not present to the California Supreme Court the substance of the following claims: I, II, III, IV, V, VI, VII, VIII, IX.B, IX.C, IX.D, IX.E, IX.F, IX.G, IX.H, IX.I, XII.A, XII.C, XII.D, XIII, XV.A, XVI.A, XVI.B, XVI.E, XVIII, XIX and XX. The court also agrees that the eight claims respondent identifies as completely exhausted have in fact been fully and fairly presented to the California Supreme Court. The remaining claims are discussed below.

(i) Partially exhausted claims

Six subclaims include both exhausted and unexhausted legal theories. In Claim IX.J, petitioner argues that trial counsel provided ineffective assistance because he did not object to the prosecution's use of the attempted rape of the victim as an aggravating factor at the penalty phase. Petitioner argued to the California Supreme Court that counsel should have objected because the attempted rape was not an appropriate aggravating factor, and the state court rejected the claim on that basis. *See Taylor*, 52 Cal.3d at 743. This legal argument is therefore exhausted.

Petitioner now argues that trial counsel should have objected to the attempted rape on the additional ground that it was not supported by sufficient evidence. Petitioner has not presented either the operative facts or the legal theory supporting this claim to the California Supreme Court. This part of the claim is thus unexhausted.

In Claim IX.K, petitioner argues that trial counsel rendered ineffective assistance under the Sixth

Amendment by failing to object to photographs of the victim while alive. *See Taylor*, 52 Cal.3d at 731-32, 747. Petitioner also argues that counsel's failure made the trial fundamentally unfair and unreliable in violation of the Fifth, Eighth and Fourteenth Amendments. Petitioner did not raise the Fifth, Eighth and Fourteenth Amendment theories in his briefing before the California Supreme Court. These legal theories are therefore unexhausted.

Claim XII.B also includes both exhausted and unexhausted arguments. Petitioner argued in his opening brief on direct appeal that the prosecutor denied him due process by failing to comply with the notice requirements of California Penal Code § 190.3. *See People v. Taylor*, Appellant's Opening Brief [hereinafter AOB] at 81 n. 55. Petitioner described for the state court the operative facts and the federal constitutional theory for his argument. This argument is thus exhausted, even though the California Supreme Court's decision did not expressly address the due process theory. *See Smith*, 434 U.S. at 333; *Beam*, 3 F.3d at 1305-06. Petitioner did not argue in state court that the prosecutor's conduct violated his Sixth Amendment right to counsel. This legal theory for claim XII.B has not been exhausted.

Petitioner presented to the California Supreme Court the equal protection basis for claim XVI.C: The California death penalty statute is unconstitutional because it does not require a finding of premeditation. *See Taylor*, 52 Cal.3d at 747. He did not argue to that court that the statute's failure to require premeditation violates due process, the Sixth Amendment and the Eighth Amendment. These legal theories are therefore unexhausted. Similarly, the due process basis for petitioner's challenge to the motive instruction (claim XVI.F) has been presented to the California Supreme

Court (*see id.*), but the Sixth and Eighth Amendment grounds have not.

In claim XVI.L, petitioner contends that the California death penalty statute is unconstitutionally vague, arbitrary and overbroad for four specific reasons. He also argues that the enumerated defects in the statute, considered cumulatively, render it unconstitutional. This court agrees with respondent that only the second enumerated defect--failure to require written jury findings--was presented to the California Supreme Court. The rest of claim XVI.L is therefore unexhausted.

(ii) Factual exhaustion

This court further concludes that five claims identified by respondent as all or partially unexhausted are in fact exhausted. With respect to two of these claims, respondent argues that new allegations render previously presented claims unexhausted. As discussed in more detail below, the new allegations do not change the substance of the claims presented to the state court.

In claim IX.A, petitioner contends that trial counsel provided ineffective assistance because he did not object to aggravating evidence that petitioner pled guilty to two 1984 burglaries. Petitioner raised this claim in both his opening brief and his state habeas corpus petition. On direct appeal, the California Supreme Court held that petitioner could not show prejudice. *See id.* at 740. Petitioner has added an allegation that the California Supreme Court improperly analyzed the prejudicial effect of the evidence. This new allegation does not change the legal theory of the claim--that trial counsel provided constitutionally defective and prejudicial representation--or fundamentally alter the factual basis for the claim. *See Vasquez*, 474 U.S. at 260; *Crotts*, 1995 WL 592798 at 3. The claim remains exhausted.

In claim XII.E, petitioner contends that he was denied due process by the prosecutor's argument that he showed no remorse for the crimes. The California Supreme Court denied the claim on the merits. *See id.* at 744-45. Petitioner now alleges that the argument was made in bad faith because the prosecutor should have known that he had shown remorse. This new allegation about the prosecutor's knowledge does not "fundamentally alter" or "substantially improve" the prosecutorial misconduct claim. *See Vasquez*, 474 U.S. at 260; *Aiken*, 841 F.2d at 883. The claim is exhausted.

(iii) Exhaustion of Federal constitutional grounds

The court also disagrees with respondent's contentions that the federal constitutional bases for the remaining three claims have not been presented to the California Supreme Court. Claim XI is exhausted because petitioner made the due-process and double-jeopardy arguments in his opening brief. *See* AOB at 148 n. 92. Claim XIV is exhausted because petitioner argued to the state court that the unitary jury violated his rights under the Sixth, Eighth and Fourteenth Amendments. *See id.* at 100 n. 66. Claim XVI.D is exhausted because petitioner made the federal constitutional due-process argument in his opening brief on direct appeal. *See id.* at 142 n. 88.

(2) Exhaustion Procedure

(a) Legal Framework

In *Rose v. Lundy*, 455 U.S. 509, the Supreme Court resolved a split among the Circuits as to the proper disposition of a "mixed" habeas petition containing both exhausted and unexhausted claims. Several circuits, including the Ninth [*see, e.g., Gonzales v. Stone*, 546 F.2d

807 (9th Cir. 1976)], had adopted a "total exhaustion" rule requiring dismissal of a mixed petition. Other circuits had permitted review of the *exhausted* claims in a mixed petition. *Rose*, 455 U.S. at 513, n. 5.

Finding that the "total exhaustion" rule "promotes comity and does not unreasonably impair the prisoner's right to relief," the Supreme Court held that a "district court must dismiss habeas petitions containing both unexhausted and exhausted claims." *Id.* at 522. In the alternative, a petitioner who submits a mixed petition has the option of amending the petition to delete the unexhausted claims. *Id.* at 520. However, a petitioner who chooses to do so and proceeds on his exhausted claims "risks dismissal of subsequent federal petitions." *Id.* at 521.

In the late 1980's, well after *Rose* was decided, the Ninth Circuit's Death Penalty Task Force formulated model local rules for the district courts. This court adopted Local Rule 296, modeled on the Ninth Circuit's rules, in 1988.

Local Rule 296-8(e) set out an abeyance procedure for mixed petitions under which the district court was to determine whether a newly filed petition contained unexhausted claims and, if it did, hold the entire petition in abeyance while the petitioner exhausted those claims in state court.[5] Local Rule 296-8(e) was an attempt to

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5. L.R. 296-8(e) states:

If the petition indicates that there are unexhausted claims for which a state court remedy is still available, petitioner will be granted a sixty (60) day stay of execution in which to seek a further stay from the state court in order to litigate the unexhausted claims in state court. During proceedings in state court, the proceedings on the

accommodate both the Supreme Court's decision in *Rose* and other Ninth Circuit precedent, namely *Neuschafer v. Whitley*, 860 F.2d 1470, 1472 n. 1 (9th Cir. 1988). In *Neuschafer*, the Ninth Circuit had addressed the question whether withholding claims from a first federal petition because they were unexhausted could constitute grounds for finding an abuse of the writ when a second petition was brought raising those claims once they had been exhausted. In dicta, the Ninth Circuit stated that a district court may hold a habeas petition in abeyance while the petitioner exhausts his unexhausted claims. *Id.* at 1472, n. 1. Since the adoption of L.R. 296-8(e), the practice in this district has been to permit filing of mixed petitions and to follow the procedure outlined above.

Recent rulings by the Ninth Circuit cast doubt on the validity of this procedure. First, in *Greenawalt v. Stewart*, 105 F.3d 1268 (filed January 17, 1997), that court held that a district court did not abuse its discretion when it declined to hold a successive petition containing a single, unexhausted claim in abeyance and instead dismissed the petition pursuant to *Rose*. *Id.* at 1275. The Ninth Circuit further stated " . . . [petitioner] contends that counsel might have persuaded the district court to stay the petition instead of dismissing it, pursuant to . . . *Neuschafer*. As we explained earlier, any such action by the district court would have violated *Rose*." *Id.* at 1276. Thus, the Ninth Circuit suggested that a district court might abuse its discretion if it held a mixed petition in abeyance rather than dismissing it.

The Ninth Circuit reiterated this position in *Calderon v. U.S.D.C. (Gordon)*, ___ F.3d ___, 1197 W.L.

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petition will be stayed. After state court proceedings have been completed, petitioner may amend the petition with respect to the newly exhausted claims.

71765 (9th Cir., Feb. 21, 1997), where it stated that a district court properly struck a mixed petition containing both exhausted and unexhausted claims. The court noted that "because Gordon's amended habeas corpus petition undisputedly contained unexhausted state claims, dismissal of the federal action was required." *Id.* at *4. The court then expressly vacated that portion of the district court's opinion that had relied on an Eastern District Local Rule identical to Northern District L.R. 296-8(e) as authority for the stay of a mixed petition.

Despite its insistence that a *mixed* petition must be dismissed, the Ninth Circuit nonetheless made it clear that the district court may hold in abeyance a first habeas petition containing only *exhausted* claims while the petitioner exhausts newly discovered, unexhausted claims in state court. *Greenawalt*, 105 F.3d at 1274, approving of *Fetterly v. Paskett*, 997 F.2d 1295. That is because "a district court has discretion to stay a petition which it may validly consider on the merits," and because the equities favoring a stay are greater in the context of a first petition. *Id.*

(b) Scope of *Greenawalt* and *Gordon*

Respondent contends that *Greenawalt* and *Gordon* compel dismissal of the pending mixed petition. Petitioner asserts that *Greenawalt*[6] is not binding under the circumstances here because it is factually distinguishable. Petitioner essentially argues that *Greenawalt*'s statement that mixed petitions must be dismissed is dicta because the petition there contained only a single unexhausted claim and no exhausted claims.

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6. Petitioner's opposition to the motion was filed on the same day that *Gordon* was decided. Therefore, petitioner's argument does not take *Gordon* into account.

The court agrees with petitioner that, on the facts presented in *Greenawalt* and *Gordon*, those courts' announcement of a dismissal rule for mixed petitions may be dicta. Ultimately, however, it is unnecessary to undertake an exhaustive analysis of *Greenawalt* and *Gordon* to decide this issue. In a recent decision the Ninth Circuit considered the district court's dismissal for failure to exhaust a petition containing four claims. *Reutter v. Crandel*, 97 D.J.D.A.R. 3811 (9th Cir., Mar. 24, 1997). The district court had found all four unexhausted. On appeal, the Ninth Circuit disagreed as to three of the claims, but agreed that the first federal claim was unexhausted. It then held: "The petition is mixed and so requires dismissal. [Citation.] Reutter may strike the unexhausted claim and resubmit his petition to the district court. [Citation.]" *Id.* at 3812.

The *Reutter* holding eliminates any doubt: the rule in the Ninth Circuit is now that a mixed petition must be dismissed or the unexhausted claims stricken. Accordingly, the court rejects petitioner's first argument.

(c) Applying the Rule of *Greenawalt* and *Gordon* Will Not Deny Petitioner Due Process

(i) Legal Framework and Contentions

Until quite recently, *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), governed the law of retroactivity

of civil judicial decisions.[7] *Chevron* sets out a three-pronged analysis, asking whether the decision in question:

> (1) establishes a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed;
>
> (2) states a rule whose retrospective application will retard more than further its operation, considering the rule's prior history and its purpose and effect;
>
> (3) is a decision whose retroactive application could produce substantial inequitable results, and for which a holding on non-retroactivity would avoid injustice or hardship.

See Reed v. Hoy, 891 F.2d 1421, 1424-25 (9th Cir. 1989); *Austin v. City of Bisbee*, 855 F.2d 1429, 1432-33 (9th Cir. 1988).

In *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993), the Supreme Court set forth a new civil retroactivity rule. The Supreme Court held: "[w]hen this court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law

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7. Petitioner asserts that the law of *civil* retroactivity governs this analysis, rather than the law of retroactivity of criminal decisions [*Griffith v. Kentucky*, 479 U.S. 314 (1987)], or the rule of non-retroactivity of new constitutional rules of criminal procedure [*Teague v. Lane*, 489 U.S. 288 (1989)], because habeas corpus is in essence a civil remedy. Respondent does not dispute this contention, and the court agrees.

and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper*, 509 U.S. at 97; *see also Mujahid v. Meyer*, 59 F.3d 931 (9th Cir. 1995).

Petitioner first contends this case is controlled by *Chevron*. Petitioner contends the *Harper* rule applies only: (1) when the new rule was actually applied in the case announcing it; and (2) when the new rule is announced by the Supreme Court. Because the *Greenawalt* court did not apply the total exhaustion rule in the case before it (because announcement of the rule in that case was dicta), and because *Greenawalt* came out of the Ninth Circuit, according to petitioner *Chevron* controls.

Petitioner then contends that applying *Greenawalt* to dismiss his case would be impermissibly retroactive under *Chevron*. First, he argues *Greenawalt* announced a "new principle of law" because it purports to overrule a Local Rule of this court, "akin" to a statute. Second, he contends application of the dismissal rule here will not further its purpose because there are only a small number of cases in a like procedural posture and thus respondent will not be prejudiced if the court declines to apply it. Third, he contends that retroactive application of *Greenawalt* will have substantial inequitable results because dismissal of the petition, and refiling post-Act, could potentially "decimate" his claim. Petitioner suggests his claims could be barred by the statute of limitations if he refiles after exhaustion. He further asserts that he relied on the Local Rule in filing a mixed petition and thus in fairness the court should decline to apply *Greenawalt* to him.

Respondent argues the court must dismiss the mixed petition under *Harper* because *Greenawalt* and

Gordon announced and applied the mixed petition dismissal rule. Further, even under *Chevron*, application of the dismissal rule would not be impermissibly retroactive for two reasons. First, the rule those cases announced was not "new" in light of *Rose*, and this court's Local Rule cannot "trump" *Rose*. Second, even if the rule is new, its application will not cause injustice because petitioner can simply refile the petition after exhaustion. He will not be deprived of a federal hearing; the hearing will merely be postponed. Thus, according to respondent, there is no denial of due process to apply the dismissal rule here.

(ii) Analysis

The court first must decide which retroactivity analysis controls--*Chevron* or *Harper*. If *Harper* controls, then the analysis is at an end, and the court must apply the dismissal rule to this case because of *Reutter*. If *Chevron* controls, however, the court must determine whether application of the dismissal rule is impermissibly retroactive.

Petitioner asserts that *Harper* is inapplicable here for two reasons: (1) because the dismissal rule was not applied in *Greenawalt*; and (2) because *Greenawalt* was not a decision of the Supreme Court. As explained above in Section B(2), however, even if *Greenawalt* and *Gordon* did not apply the mixed petition dismissal rule in the cases before them, the court in *Reutter* unquestionably did so. Thus, petitioner's first ground for declining to apply *Harper* fails.

Turning to petitioner's second argument, *Holt v. Shalala*, 35 F.3d 276, 380 (9th Cir. 1994), which petitioner cites, does not support the proposition that *Harper* applies only to decisions of the Supreme Court. There, the Ninth

Circuit held only that "[b]ecause the Supreme Court in [*Shalala v. Schaefer*, 509 U.S. 292 (1993)] did not apply the new rule it announced to the case at bar, we apply traditional *Chevron* analysis here." *Holt*, 35 F.3d at 380, n. 3. *Holt* did not hold that only decisions of the Supreme Court are subject to *Harper* analysis. Thus, *Holt* does not tell us which retroactivity analysis controls decisions other than those of the Supreme Court.

The other cases petitioner cites are no more helpful. He cites several cases where the Ninth Circuit applied *Harper* to Supreme Court decisions. But none of these cases involved an appeals court decision, they shed no light on whether *Chevron* retroactivity analysis controls such decisions. The court is aware of no Ninth Circuit cases discussing whether *Harper* applies to a decision of the Ninth Circuit.[8] Thus, the question appears to be undecided.

The court finds, however, that it need not decide this question. Even under *Chevron*, the court finds application of the dismissal rule is not impermissibly retroactive because the rule is not "new."

For a rule to be considered "new" under *Chevron*, it must create a "clear break with past precedent." *Dean v. TWA, Inc.*, 924 F.2d 805 (9th Cir. 1991) *Greenawalt*, *Gordon* and *Reutter* did not do so. Even before *Rose*, the Ninth Circuit had announced and applied a "total exhaustion" rule for mixed petitions. *E.G.*, *Gonzales v. Stone*, 546 F.2d 807 (9th Cir. 1976); *James v. Reese*, 546 F.2d 325 (9th Cir. 1976). The trend continued after *Rose*. *E.g.*, *Campbell v. Blodgett*, 927 F.2d 444, 445 (9th Cir.

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8. A single Tenth Circuit case used *Harper* to decide the retroactivity of a Third Circuit decision. *Olcott v. Delaware Flood Co.*, 76 F.3d 1538, 1547-48 (10th Cir. 1996).

1991); *Roman v. Estelle*, 917 F.2d 1505 (9th Cir. 1990); *Guizar v. Estelle*, 843 F.2d 371 (9th Cir. 1988); *Kellotat v. Cupp*, 719 F.2d 1027 (9th Cir. 1983); *Szeto v. Rushen*, 709 F.2d 1340 (9th Cir. 1983); *see also Powell v. Spalding*, 679 F.2d 163, 166 (9th Cir. 1982) (affirming denial of leave to amend petition to assert unexhausted claim where amendment would have necessitated dismissal under *Rose*). That the Ninth Circuit sometimes overlooked the rule and proceeded to consider mixed petitions does not lessen the force of these cases. *E.g.*, *Garrison v. McCarthy*, 653 F.2d 374, 376 (9th Cir. 1981) (reviewing exhausted claims in mixed petition because district court did so and dismissal of entire petition would give petitioner the opportunity to relitigate the exhausted claims); *accord Carothers v. Rhay*, 594 F.2d 225, 228 (9th Cir. 1979).

Further, as the Ninth Circuit noted in *Greenawalt*, *Neuschafer*'s statement that a district court may hold a mixed petition in abeyance was dicta. And even if *Neuschafer* created a split of authority with the other cases noted above, it cannot be said that the Ninth Circuit's recent adherence to the total exhaustion rule clearly broke with past precedent.

Petitioner's argument with respect to Local Rule 296-8(e) fares no better. *Greenawalt* and *Gordon* did break with the procedure outlined in that rule.[9] However, local rules must be interpreted in a manner consistent with Acts of Congress [*see* 28 U.S.C. § 2071-(a); Fed. R. Civ. P. 83(a); N. Dist. L.R. 296-1; *see also* Habeas

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9. As noted above, the *Gordon* court vacated that part of the district court's decision that had relied on an identical Eastern District local rule as authority to stay a mixed petition rather than dismissing it. *See Gordon*, 1997 W.L. 71765, *5 (vacating part II.B of district court's opinion, *Gordon v. Vasquez*, 859 F.Supp. 413, 417 (E.D. Cal. 1994).

L.R. 2254-2] and thus with the case law interpreting those acts. Moreover, the local rule was merely a rule of practice, not "precedent" enshrined in binding case law.[10/]

In sum, the court finds that *Greenawalt*, *Gordon* and *Reutter* did not clearly break with past precedent to announce a "new" rule. Accordingly, it is not impermissibly retroactive to apply the dismissal rule here.

(d) The court will permit petitioner to amend the petition to withdraw the unexhausted claims and will hold the amended, fully exhausted petition in abeyance

Petitioner asserts that even if the court applies *Greenawalt* here, it must permit him to amend the petition to delete the unexhausted claims. He asserts that, once the unexhausted claims have been deleted, a valid petition will be before the court that may than be stayed under *Fetterly v. Paskett*, 997 F.2d 1295 (9th Cir. 1993). He contends that denial of a stay would be an abuse of discretion because this is his first habeas petition, he relied at all times on the local rule in filing a mixed petition, and his stay request is not a delaying tactic.

Respondent argues the court cannot "bypass" the total exhaustion rule by the procedural device of withdrawal and abeyance. Respondent suggests that

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10. Petitioner cites *United States v. Hyass*, 355 U.S. 570 (1958), for the proposition that local rules are "laws of the United States." There, the Supreme Court held that a local rule of a district court, which authorized that court to take testimony under oath of an out-of-state attorney, was a "law of the United States" within the meaning of 18 U.S.C. § 1621, the federal perjury statute. This case has nothing to do with perjury. Thus, *Hyass* does not aid in the retroactivity analysis.

amending the petition is impermissible; he points out that, while Chapter 154 is inapplicable here, under that Chapter no amendment is permitted unless petitioner makes a showing of "cause" and "innocence." 28 U.S.C. § 2266(b)(3)(B).

Respondent further argues that if the court permits withdrawal of the unexhausted claims, the court must adjudicate the exhausted claims rather than staying them. Petitioner then must risk having any subsequent petition dismissed as an abuse of the writ. He asserts that *Fetterly* is distinguishable because there the petitioner filed a fully exhausted federal petition and later discovered the existence of unexhausted claims, while here petitioner knew of the unexhausted claims when he filed the petition. If the court permits withdrawal and abeyance, he argues, petitioners will have no incentive not to file mixed petitions in the future.

(i) The court will permit petitioner to amend the petition to delete the unexhausted claims

The court agrees with petitioner that it must permit him to delete the unexhausted claims from the petition. *Rose* expressly states that a petitioner has that option. *Rose*, 455 U.S. at 520 (petitioner "can always amend the petition to delete the unexhausted claims"). Ninth Circuit habeas authority confirms it. *Reutter v. Crandel*, 97 D.J.D.A.R. at 3812 (petitioner may choose to strike unexhausted claims); *James v. Borg*, 24 F.3d 20, 24 (9th Cir. 1994) (same); *Roman v. Estelle*, 917 F.2d at 1506 (holding petitioner must be given opportunity to amend mixed petition to include only the exhausted claims); *Guizar v. Estelle*, 843 F.2d at 372 (holding petitioner may resubmit petition with only exhausted claims); *see Ostrosky v. State of Alaska*, 913 F.2d 590, 593 n. 9 (9th Cir. 1990).

Moreover, Federal Rule of Civil Procedure 15, regarding amendment of complaints, applies in the habeas context. *See* 28 U.S.C. § 2242 (habeas corpus application "may be amended or supplemented as provided in the rules of procedure applicable to civil actions"); Advisory Committee Note to Rule 11 of Rules Governing Section 2254 Cases (district court has discretion to use any Civil Rule when appropriate to circumstances); *Withrow v. Williams*, 113 S.Ct. 1745, 1755-56 n. 7 (1993). F.R.C.P. 15(a) provides that "a party may amend his pleading once as a matter of course at any time before a responsive pleading is filed." The Ninth Circuit has held in another context that a motion to dismiss for lack of jurisdiction is *not* a "responsive pleading" within the meaning of that rule. *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995). Respondent's motion to compel exhaustion is somewhat analogous to a motion to dismiss for lack of jurisdiction. Thus, because respondent has not yet answered the petition, it appears that under F.R.C.P. 15 the court must give petitioner an opportunity to amend to cure any defect before it dismisses the petition.

Respondent's citation to 28 U.S.C. § 2266(b)(3)(B), part of the Chapter 154 "opt-in" provisions, only underscores the point. That Congress included such strict limits on amendment in Chapter 154, but did not include such limits in Chapter 153, if anything indicates a Congressional intent to permit amendment when the prisoner is, as here, proceeding under Chapter 153.

Nothing in *Greenawalt* or *Gordon* undermines this conclusion. In *Greenawalt*, the petition contained only a single unexhausted claim, so the petitioner could not have complied with *Rose* by deleting it and the court had no option but to dismiss. In *Gordon*, neither party raised the possibility of deleting unexhausted claims. Thus, neither

case stands for the proposition that amendment is impermissible.

In light of these authorities, there is no reasonable argument that the court lacks authority to permit petitioner to withdraw the unexhausted claims. The court therefore will permit petitioner to do so.

(ii) The court will exercise its discretion to hold the fully exhausted petition in abeyance pending exhaustion of the unexhausted claims

The court turns next to the question of the proper disposition of the exhausted petition once the unexhausted claims are deleted. Petitioner cites *Fetterly v. Paskett*, 997 F.2d 1295 (9th Cir. 1993), in support of his request that the court hold his petition in abeyance once he removes the unexhausted claims. In *Fetterly*, the attorney who had represented petitioner at every stage in state court filed on his behalf a fully exhausted first federal habeas petition. Newly appointed counsel then discovered the existence of a new, unexhausted claim of sentencing error. Recognizing that amending the petition to include the unexhausted claim would subject the petition to dismissal under *Rose v. Lundy*, petitioner asked the district court to stay the federal proceedings while he exhausted the new claim in state court, and then permit him to amend the petition to include the claim after it was exhausted. The district court refused to grant a stay, finding the error purely one of state law and not cognizable on habeas. The court then denied the remaining claims.

On appeal, the Ninth Circuit held that the district court had abused its discretion in denying the stay to permit petitioner to exhaust the new claim. *Fetterly*, 997 F.3d at 1301-02. First, the court found the error

cognizable as a potential denial of due process. *Id.* at 1299-1301. Second, it found that the fact that the same attorney who had represented petitioner in state court had filed the federal petition "raised the specter" of ineffective assistance of counsel. *Id.* at 1301. Third, the court recognized the potential that any subsequent petition containing the new claim might be dismissed as an abuse of the writ. *Id.* at 1302. Finding "nothing at all in the record to suggest that the motion was brought to delay, to vex, or to harass," the court held it was an abuse of discretion to deny the stay. *Id.* The Ninth Circuit reaffirmed *Fetterly* in *Greenawalt*. 105 F.3d at 1274.

Respondent argues that *Fetterly* is distinguishable. Respondent notes that the petitioner in *Fetterly* discovered his unexhausted claim only *after* filing a fully exhausted habeas petition. In contrast, here petitioner knew the claims were exhausted but alleged them in a mixed petition. Thus, respondent argues, *Fetterly* does not compel this court to hold petitioner's exhausted petition in abeyance.

The court agrees with respondent that the circumstances in this case are sufficiently different from those in *Fetterly* that this court would not abuse its discretion if it declined to hold the exhausted petition in abeyance. This court has made no finding that the unexhausted claims are cognizable on habeas. No issue of ineffective assistance has been raised. And petitioner was aware of his unexhausted claims at the time he filed the federal petition.

However, that does not dispose of the question whether this court *may* nevertheless hold the exhausted petition in abeyance. "A district court has discretion to stay a petition which it may validly consider on the merits." *Greenawalt*, 105 F.3d at 1274. Once the

exhausted claims are removed from the petition here, this court could consider it on the merits; therefore the court may stay it. There are substantial reasons for the court to do exercise it discretion here.

First, petitioner has an excuse for not presenting his unexhausted claims to the state court earlier: his reliance on Local Rule 296-8(e). Before *Greenawalt* and *Gordon* were decided, petitioner was fully justified in believing he could file a mixed petition, obtain a ruling on the exhaustion status of the claims, and then present the unexhausted claims to the state court. Because of his reliance on the rule, he did not exhaust the claims earlier. The court may weigh petitioner's reliance interest in the balance in determining whether to hold the exhausted petition in abeyance rather than adjudicating it.

Respondent's argument that petitioner could have returned to state court before receiving this court's ruling identifying unexhausted claims is rejected. The court expressly stated that it would issue such a ruling; petitioner was diligent in attempting to obtain it. *See* letters of June 1996 and August 1996. Petitioner justifiably declined to guess which claims the court would consider unexhausted. Exhaustion questions often rest on fine distinctions and exercises of judgment. *See* cases cited at pp. 6-7, *supra*. If petitioner had guessed incorrectly, returned to state court to exhaust, and then filed an amended petition that still contained unexhausted claims, those claims could have been considered as an abuse of the writ. *See Farmer v. McDaniel*, 98 F.3d 815, 847 (9th Cir. 1995) (holding unexhausted claims in successive, mixed petition subject to dismissal as an abuse of the writ). Petitioner reasonably declined to engage in such speculation.

Second, if the court were to deny a stay, petitioner would in essence be forced to abandon the unexhausted claims now and litigate them in a successor petition. But this would only result in piecemeal litigation, a result the exhaustion and abuse of the writ doctrines are designed to avoid. There remains a possibility that the state court will grant relief on one of the unexhausted claims. Thus, this court might merely waste its time if it proceeds on the exhausted ones. Further, it appears that the exhausted and unexhausted claims are at least somewhat interrelated both factually and legally. Therefore, it would be most efficient to adjudicate them all at once. Given the potential prejudice to petitioner and waste of court resources from piecemeal litigation, this court should use reasonable means to ensure that all claims are litigated in a single proceeding.

Third, petitioner's other reasons for distinguishing *Greenawalt* and applying *Fetterly* are sound. Petitioner does not appear to be seeking a stay "to delay, to vex, or to harass." Rather, until this point he has proceeded in conformance with applicable court rules. Moreover, petitioner is asking for a stay of a *first* habeas petition, not a successor petition as in *Greenawalt*. The Ninth Circuit has expressly reaffirmed that the equities in favor of a stay are greater in the context, as here, of a first petition. *See Greenawalt*, 105 F.3d at 1274, citing *Lonchar v. Thomas*, 116 S.Ct. 1293, 1299 (1996) ("Dismissal of a first federal habeas petition is a particularly serious matter . . . ") Finally, petitioner did not file his petition, like the *Greenawalt* petitioner, on the eve of the Act's enactment in an attempt to avoid its consequences. Rather, he filed well before enactment.

Respondent contends the court should not stay the exhausted claims because doing so will only encourage petitioners to file mixed petitions in the future. This

argument overlooks that petitioner's reliance on Local Rule 296-8(e) is a major factor affecting today's decision. Given the Ninth Circuit's reaffirmance of the total exhaustion rule in *Greenawalt*, and *Gordon*'s vacation of the part of the district court's order using an identical local rule to stay a mixed petition, petitioners from here forward will have a lesser reliance interest.

The authorities respondent cites from other Circuits [*Victor v. Hopkins*, 90 F.3d 276 (8th Cir. 1996), and *Sterling v. Scott*, 57 F.3d 451 (5th Cir. 1995)], at most reaffirm the rule--as did *Gordon*--that a district court may not stay a *mixed* petition while the petitioner exhausts state remedies. They did not address the withdrawal/abeyance procedure proposed here.

In sum, the equitable factors here point toward granting petitioner the relief he seeks. The court will exercise its discretion to hold the exhausted petition in abeyance while petitioner exhausts the unexhausted claims.

C. Equitable Tolling

(1) Contentions

Petitioner contends he is unsure whether the one-year statute of limitations, 28 U.S.C. § 2244(d), applies to him under *Jeffries v. Wood*, 103 F.2d 827 (9th Cir. 1997), holding the Act's amendments to Chapter 153 of U.S.C. Tile 28 inapplicable to cases filed before enactment. Nonetheless, if the court dismisses the petition in whole or in part, he asks the court to equitably toll the statute of limitations on two grounds.

First, petitioner asks for tolling during the time the court delayed in ruling on respondent's motion to compel

exhaustion. Second, he asks the court to toll the statute for 90 days, during which he will complete and file a state habeas petition. He contends that the unexpected death from AIDS of counsel Stuart Buckley has disrupted preparation of the petition and this unusual circumstance warrants additional time for filing.

Respondent asserts, without discussion, that petitioner's tolling request is "premature." Nonetheless, he counters that tolling is unwarranted because petitioner could have returned to state court without a ruling from this court telling him which claims were exhausted. Further, he asserts petitioner will suffer no prejudice if the court denies tolling, because the remaining limitations period will be tolled by the filing of his state petition in any event. *See* 28 U.S.C. § 2244(d)(2).

(2) Analysis

Although respondent does not elaborate on his claim that petitioner's tolling request is "premature," the argument has merit. The court may not have all the facts necessary to decide petitioner's tolling claim before it until petitioner returns from state court and refiles the unexhausted claims. Furthermore, it is uncertain whether § 2244(d) ultimately will apply to petitioner. *See Jeffries*, 103 F.3d 827 (Chapter 153 amendments inapplicable to cases filed before enactment); *but see Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (holding application of amended 28 U.S.C. § 2254(d) to pending cases not impermissibly retroactive), *cert. granted*, 117 S.Ct. 726 (Jan. 10, 1997) (No. 96-6298). Accordingly, the court declines to rule on petitioner's equitable tolling request at this time. Petitioner may renew the tolling claim, if necessary, upon his return from state court.

D. Discovery

Respondent asks the court to reconsider it oral ruling granting petitioner's discovery motion. He asserts that *Calderon v. U.S.D.C. (Nicolaus)*, 98 F.3d 1102 (9th Cir. 1996), holding discovery is not available in a habeas action prior to filing the finalized petition, is dispositive. First, he asserts that since the petition is mixed and the court must dismiss it, the court has no authority to grant discovery. Second, even if the court does not dismiss, he contends *Nicolaus* disapproved of discovery going to unexhausted claims, and all of petitioner's requested discovery is related to such claims.

Petitioner argues that in this case the court granted *post*-petition discovery, not *pre*-petition discovery, so *Nicolaus* is inapposite. Further, he argues the requested discovery goes to exhausted claims, not unexhausted ones, so it is permissible notwithstanding *Nicolaus*.

In *Nicolaus* the Ninth Circuit held that discovery is not available in a habeas action under Habeas Rule 6 until the petitioner has filed a finalized petition. As one reason for its holding, the Ninth Circuit stated that any right to federal discovery "presupposes the presentation of an unexhausted [sic -- exhausted] federal claim." 98 F.3d at 1106. Thus, the court suggested that petitioner must exhaust the claim, and the discovery request, in state court before he will be granted discovery in federal court. The concurring Judge expressly agreed with this portion of the analysis. *Id.* at 1109 (Schroeder, J., concurring) ("Of course, Nicolaus must first exhaust his claim, along with available avenues for discovery, in state court.")

The outcome of respondent's motion thus appears to turn on whether the discovery the court granted relates to exhausted or unexhausted claims. It appears to the

court that the relevant discovery relates entirely to unexhausted claims. Such being the case, respondent's motion for reconsideration of the court's oral ruling on discovery will be granted, and no discovery will go forward. However, the court will hold a further hearing on this issue on May 2, 1997, at 10:30 a.m. If petitioner believes any of the pertinent discovery relates to exhausted claims, petitioner shall file a brief stating his objections to the court's tentative ruling at least ten days before the hearing.

ORDER

Accordingly, IT IS HEREBY ORDERED:

1. For the reasons stated above, the court concludes that the following claims are completely unexhausted: I, II, III, IV, V, VI, VII, VIII, IX.B, IX.C, IX.D, IX.E, IX.F, IX.G, IX.H, IX.I, XII.A, XII.C, XII.D, XIII, XV.A, XVI.A, XVI.B, XVI.E, XVIII, XIX and XX. The following claims are partially unexhausted: IX.J, IX.K, XII.B, XVI.C, XVI.F and XVI.L. The following claims are completely exhausted: IX.A, X, XI, XII.E, XIV, XV.B, XVI.D, XVI.G, XVI.H, XVI.I, XVI.J, XVI.K and XVII.

2. Respondent's motion for reconsideration is GRANTED in part and DENIED in part, as follows:

3. Respondent's renewed request to dismiss the petition due to the presence of unexhausted claims is DENIED.

4. Petitioner's request for permission to amend the petition to delete the unexhausted claims and allegations is GRANTED. If within 30 days of the date of this order petitioner has not resubmitted the petition with

the unexhausted claims and allegations stricken, the court will dismiss the petition.

5. If petitioner chooses to resubmit the petition with the unexhausted claims and allegations stricken, then:

a. Proceedings related to the federal petition, as amended by the elimination of the unexhausted claims and allegations, shall be STAYED until state exhaustion is completed.

b. Petitioner shall present all unexhausted claims to the California Supreme Court within 60 days of the date the amended petition is filed. Petitioner's counsel are expected to seek appointment by the California Supreme Court for all proceedings in that court.

c. Petitioner shall file a report with this court on the first day of every second month during the pendency of state proceedings setting forth whether such a petition is pending before the California Supreme Court and the status of any state proceedings. Petitioner shall file the first status report on July 1, 1997.

d. Upon filing of the amended petition, the stay of execution entered on June 30, 1995, shall be VACATED and a 60-day stay of execution entered within which petitioner may seek a further stay of execution from the California Supreme Court. *Cf.* L.R. 296-8(e).

e. Upon completion of state proceedings, petitioner shall file a second amended petition.

f. Respondent shall file an answer within 30 days of the filing of the second amended petition.

6. The motion to reconsider the oral ruling on discovery is tentatively GRANTED. The court will hold a hearing on *May 2, 1997, at 10:30 a.m.* to consider the motion further. If petitioner disagrees with the court's tentative conclusion that the relevant discovery relates solely to unexhausted claims, then at least *ten* days before the hearing petitioner shall file a brief stating his objections.

IT IS SO ORDERED.

DATED: April 1, 1997

/s/ MARILYN HALL PATEL
United States District Judge

FILED MARCH 6, 1998
CATHY A. CATTERSON, CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTHUR CALDERON, Warden,
Petitioner,

v.

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA,
Respondent,

FREDDIE LEE TAYLOR,
Real Party in Interest.

No. 97-70567
D.C. No. C 92-1627 MHP

ORDER

BEFORE: FARRIS, O'SCANNLAIN and HAWKINS, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges O'Scannlain and Hawkins have voted to reject the suggestion for rehearing en banc, and Judge Farris has so recommended.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES CODE ANNOTATED
TITLE 28

28 U.S.C. § 2254(b) (1966) formerly provided:

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

28 U.S.C. § 2254(b), as amended Apr. 24, 1996, Pub.L. 104-132, Title I, § 104, 110 Stat. 1218, now provides:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

UNITED STATES CODE ANNOTATED
TITLE 28

28 U.S.C. § 2244 (1966) formerly provided:

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not heretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of

certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

28 U.S.C. § 2244, as amended Apr. 24, 1996, Pub.L. 104-132, Title I, §§ 101, 106, 110 Stat. 1217, 1220, now provides:

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases

on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive

application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Supreme Court, U.S.
FILED
JUN 15 1998
CLERK

No. 97-1841

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

ARTHUR CALDERON, Warden, California State Prison
at San Quentin, *Petitioner*,

v.

FREDDIE LEE TAYLOR, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AND BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

NANCI L. CLARENCE
KATE JEFFERY STOIA
CLARENCE & SNELL, LLP
899 Ellis Street
San Francisco, CA 94102
(415) 749-1800
Attorneys for Respondent
FREDDIE LEE TAYLOR

34 pp

The respondent, FREDDIE LEE TAYLOR, requests leave to proceed in this matter and file a Brief in Opposition to Petition for Writ of Certiorari, without prepayment of costs and to proceed *in forma pauperis*. Respondent has been granted leave to so proceed before the United States District Court for the Northern District and the United States Court of Appeals for the Ninth Circuit. No affidavit is attached, inasmuch as the United States District Court and the United States Court of Appeals appointed counsel for petitioner pursuant to 21 U.S.C. section 848(q).

Dated: June 12, 1998

Respectfully submitted,

CLARENCE & SNELL, LLP

By: _____

NANCI L. CLARENCE
Attorneys for Respondent
FREDDIE LEE TAYLOR

No. 97-1841

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

ARTHUR CALDERON, Warden, California State Prison
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NANCI L. CLARENCE
KATE JEFFERY STOIA
CLARENCE & SNELL, LLP
899 Ellis Street
San Francisco, CA 94102
(415) 749-1800

Attorneys for Respondent
FREDDIE LEE TAYLOR

(CAPITAL CASE)

Questions Presented

1. May a District Court hold in abeyance a habeas corpus petition containing exhausted claims while the state prisoner returns to state court to exhaust known, but as yet unexhausted, claims.

2. May a District Court permit amendment of any abeyant petition by the addition of claims following state court exhaustion.

LIST OF PARTIES

Arthur Calderon, Warden, California State Prison at San Quentin, was the petitioner in proceedings before the United States Court of Appeals for the Ninth Circuit, and is the petitioner in this Petition for Write of Certiorari.

The United States District Court for the Northern District of California was the respondent in proceedings before the United States Court of Appeals for the Ninth Circuit.

Freddie Lee Taylor, a state prisoner sentenced to death under the laws of the State of California, was the real party in interest in proceedings before the United States Court of Appeals for the Ninth Circuit, and is respondent in this Petition for Writ of Certiorari.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997
No. 97-1841

ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

v.

FREDDIE LEE TAYLOR, *Respondent*

I. STATEMENT OF THE CASE

The conviction and death sentence of respondent Freddie Lee Taylor (hereinafter "Taylor") were affirmed by the California Supreme Court on December 31, 1990.[1] The California Supreme Court had previously denied Taylor's state habeas corpus petition on September 26, 1990.

On June 12, 1992, the United States District Court for the Northern District of California appointed undersigned counsel to represent Taylor in federal habeas corpus proceedings. Notwithstanding the State's characterization of the proceedings in federal court, the record demonstrates that Taylor has proceeded with the utmost attention to all filing deadlines and has never sought any unwarranted delay. Taylor filed his first federal petition for Writ of Habeas Corpus in the district court on July 10, 1995. Pursuant to the Northern District Local Rules in effect at that time, Taylor's petition contained both exhausted and unexhausted claims. On August 14, 1995, the State filed a Motion to Dismiss Petition or, in the alternative, to Compel Exhaustion. Taylor opposed the State's motion and filed a Counter-motion for Leave to Conduct Discovery. On October 20, 1995, the district court heard arguments on the cross motions and issued oral rulings, including *inter alia*, the denial of the State's Motion to Dismiss and the partial granting of Taylor's Counter-motion for Discovery. At the hearing, the district court declined Taylor's offer to submit briefing stating his position concerning exhaustion. Instead, the district court issued a tentative ruling regarding exhaustion and stated that a formal order would follow.

The district court's final order on exhaustion was not issued until April 1, 1997. At that time, as the district court noted, "major developments ha[d] reshaped the law under which the

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[1] People v. Taylor, 52 Cal.3d 719 (1990).

court must consider exhaustion and discovery issues." First, in October 1996, the Ninth Circuit held that discovery is not available in a habeas action prior to the filing of the finalized petition and also suggested that discovery on unexhausted claims is impermissible.[2] In light of that ruling, Taylor filed a Statement of Non-Opposition which accepted the district court's tentative ruling prohibiting discovery insofar as the "relevant discovery relates entirely to unexhausted claims."

The second major development affecting Taylor's federal proceedings occurred on April 24, 1996, almost a year after Taylor had filed his federal habeas petition. On that date, President Clinton signed into law the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA).[3] The AEDPA enacts, *inter alia*, a one year statute of limitations for all federal habeas petitions filed by state prisoners.[4] Following enactment of the AEDPA, Taylor filed an Ex-Parte Request for Status Conference and Briefing Schedule on June 18, 1996 in order to obtain the district court's guidance regarding the potential impact of the new Act. On August 15, 1996, Taylor submitted a letter expressing concern that no status hearing had been scheduled and also asking the Court to issue the exhaustion and discovery orders that the Court stated would be forthcoming. Due to the uncertainty of the scope and applicability of the AEDPA, and because written orders had not been issued by the district court regarding exhaustion and discovery, Taylor did not proceed with the discovery sought nor did he file a state exhaustion petition.

The third major development considered by the district court in resolving exhaustion issues

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2 Calderon v. United States District Court (Nicholas), 98 F.3d 1102 (9th Cir. 1996).

3 Pub. L. 104-132, 110 Stat. 1214.

4 28 U.S.C. section 2244(d).

was the Ninth Circuit's decisions in Greenawalt v. Stewart[5] and Calderon v. United States District Court (Gordon),[6] issued on January 17 and February 21, 1997, respectively. In light of Greenawalt and Gordon, the State moved for reconsideration of the district court's preliminary oral rulings on exhaustion and discovery of October 20, 1995, and, in the alternative, for issuance of a written ruling on the State's Motion to Dismiss. While Taylor had no opposition to the State's alternative request for issuance of a written order (a result he also had been attempting to obtain), he opposed the State's request for reconsideration of its preliminary oral rulings of October 20, 1995 on the ground that as Greenawalt and Gordon did not compel dismissal of his petition.

A hearing on the State's motion was held in the district court on March 28, 1997, and on April 1, 1997, the district court issued a written order. In its order, the district court first engaged in a detailed analysis of Taylor's claims and ruled on their exhaustion status. The court held, *inter alia*, that it would permit Taylor 30 days to delete the unexhausted claims and that it would hold in abeyance an amended petition containing only exhausted claims while Taylor exhausted his remaining claims in state court. The court cautioned Taylor, however, that "if within 30 days of the date of its order [Taylor] had not resubmitted the petition with the unexhausted claims and allegations stricken, the court [would] dismiss the petition." The court further ordered Taylor to present his unexhausted claims to the California Supreme Court within 60 days of the date the amended petition was filed.

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[5] 105 F.3d 1268 (9th Cir. 1997), cert. denied, 117 S.Ct. 794.

[6] 107 F.3d 756 (9th Cir. 1997).

In addition, the district court ordered that Taylor's indefinite stay of execution would be vacated upon filing of his amended petition and that he would receive a 60 day stay of execution within which he could seek a further stay from the California Supreme Court. Id. Finally, the court ordered Taylor to file a second amended federal petition upon completion of state proceedings and directed the State to respond within 30 days of the filing of the second amended petition. Id. The district court did not, however, consider any "abuse of the write" arguments or indicate how it would rule on any "abuse of the writ" challenge by the State to such a second amended petition.

Pursuant to the district court's orders, Taylor filed his First Amended Petition for Writ of Habeas Corpus on April 30, 1997, which contained only those claims determined to be exhausted by the district court. Taylor's indefinite stay of execution was vacated by order of the district court on May 7, 1997, at which time the court entered a temporary stay of execution, through and including June 29, 1997. On June 27, 1997, Taylor filed a petition for writ of habeas corpus in the California Supreme Court, which contained those claims determined to be unexhausted by the district court in its written order of April 1, 1997. The State, after seeking four extensions, filed its Informal Response to the Petition on June 1, 1998. Pending state court exhaustion, Taylor's exhausted claims petition is currently being held in abeyance pursuant to the district court's order. Taylor's federal stay of execution has expired and he will not seek further action by the federal district court until his remaining claims have been reviewed by the state court.

On May 14, 1997, the State filed a Petition for a Writ of Mandate before the Ninth Circuit Court of Appeals. The court denied the petition and denied the State's petition for rehearing and suggestion for rehearing *en banc*. On May 12, 1998, the State filed a Petition for Writ of

Certiorari before this Court; the Petition was placed on the docket on May 14, 1998.

II. REASONS FOR DENYING THE PETITION

A. Summary of Argument

The current procedural posture of this case — challenged here by the State — does not constitute a recurring problem because the local rule on which petitioner relied *is no longer in effect*. Nor, following the Ninth Circuit's Greenawalt ruling, may such a rule be resurrected. Simply put, the procedural posture of Taylor's case *cannot recur* given the recent changes in the law. The State therefore requests that this Court issue a ruling which will affect a handful of cases at best. Taylor urges this Court to decline the State's invitation.

In reaching their decisions in this case, both the district court and the Ninth Circuit relied heavily on the fact that petitioner had carefully and diligently followed the law in effect at the time his federal petition was filed. Notwithstanding the State's alarmist arguments, the plain fact is that the "stay and abeyance" mechanism employed in this case by the district court, and sanctioned by the Ninth Circuit, is not a practice that will likely be followed by Courts in the future as the procedural underpinnings presented here will not arise again. Put in context, the stay and abeyance procedure was a measured response to manage petitions brought during a maelstrom of changes in the law, a circumstance which only existed for a brief window of time. In fact, the procedure affects only the very few habeas petitions, such as Taylor's, which were filed as mixed petitions during the narrow window of time *after* the adoption of a Northern District Local Rule which allowed stay and abeyance of habeas petitions and *before* January 17, 1997, the date of the Ninth Circuit's Greenawalt decision holding that the Local Rule's procedure was improper. All habeas petitioners who filed petitions during that time were bound by (and justifiably relied on)

former Local Rule 296-8(e), adopted by the district courts of the Northern District of California in 1988 (or its analog in other districts). Former Local Rule 296-8(e) set forth an abeyance procedure under which the district court was to determine whether a newly filed petition contained unexhausted claims and, if it did, hold the entire (mixed) petition in abeyance while the petitioner exhausted those claims in state court. Former Local Rule 296-8(e) was itself the result of the 1988 Ninth Circuit case of Neuschafer v. Whitley, in which the court stated that a district court may hold a mixed habeas petition in abeyance while the petitioner exhausts his unexhausted claims.[7] Despite the State's current insistence that such a practice violates long-standing precedent, review of the Ninth Circuit's Neuschafer ruling was not sought by the State.

Nor did the State ever seek review of the former Local Rule's abeyance mechanism. In January of 1997, the Ninth Circuit essentially reversed itself without prompting from the State, holding that a district court would abuse its discretion by following the former Local Rule and holding a mixed petition in abeyance rather than dismissing it.[8] The Ninth Circuit reiterated this position in February of 1997, firmly stating that a mixed petition must be dismissed and vacating the portion of the district court's order in that case which relied on former Local Rule 296-8(e).[9] Therefore, after Greenawalt and Gordon, a *mixed* petition, such as the one properly filed in this case in reliance on former Local Rule 296-8(e), must be dismissed and may not be held in abeyance. A petitioner seeking habeas relief following Greenawalt and Gordon is on notice that

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[7] Neuschafer v. Whitley, 860 F.2d 1470, 1472 n. 1 (9th Cir. 1988).

[8] Greenawalt v. Stewart, 105 F.3d 1268 (9th Cir. 1997).

[9] Calderon v. United States District Court (Gordon), 107 F.3d 756 (9th Cir. 1997).

any federal petition *must* contain exhausted claims only. It is noteworthy that the only case which the State cites in support of its claim that the stay and abeyance mechanism "has become the norm"[10] is a case in which the federal habeas petition had been filed *after* Greenawalt, when the Local Rule upon which Taylor reasonably and justifiably relied was *no longer in effect*.[11] Unlike the petitioner in that case, however, Taylor justifiably relied on the Northern District Local Rule in bringing his petition. At the time that Taylor filed his petition, in July of 1995, the Local Rule permitted him to file a mixed petition, and Taylor carefully followed that rule so as not to jeopardize any of his claims. Both the district court and the Ninth Circuit recognized the importance of the fact that Taylor had reasonably and justifiably relied on the former Local Rule, and the district court carefully fashioned a remedy — the stay and abeyance mechanism employed here — which would not unduly jeopardize Taylor's claims, given the changes in the law. It is this rapidly shifting legal landscape that prompted courts to utilize the stay/abeyance procedure.

The central harm complained of by the State in its Petition — that the district court's stay and abeyance of Taylor's habeas petition will "avoid the abuse of the writ doctrine"[12] — is not yet ripe for adjudication by this Court, because it has not yet occurred. Under the Order entered by the district court in this case, Taylor has amended his federal habeas petition so that it contains only *exhausted* claims. The district court has stated that it will hold this petition in abeyance while Taylor returns to the California Supreme Court to exhaust his as-yet unexhausted claims. Once

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[10] State's Petition, p. 5, fn 1.

[11] Ashmus v. Caldron, 977 F.Supp. 987 (N.D.Cal. 1997).

[12] State's Petition, p. 5.

Taylor exhausts those claims, and assuming relief is not granted by the California Supreme Court, the district court has ordered him to amend his current habeas petition so that it contains all of his exhausted claims. The State will then have an opportunity to respond to the amended federal petition.

The State's putative concern is that the amended petition which eventually may be filed will not be subject to an abuse of the writ challenge. In fact, the State has returned to this point again and again, at every stage of these proceedings. The plain fact is, however, that this issue was not fully briefed in either of the lower courts and, significantly, neither court has yet made a determination on this issue as it was never properly before them. Both the district court and the Ninth Circuit concluded that any ruling on the State's abuse of the writ argument would be *premature* because *Taylor has not yet and may never file a petition which could even be challenged on that basis*. The State now asks this Court to issue the same type of advisory opinion which the lower courts wisely declined to issue. This Court should similarly decline the State's invitation.[13]

Nor does Taylor's case implicate the one-year statute of limitations under the AEDPA because Taylor's habeas petition was filed well before the AEDPA was signed into law. The AEDPA therefore has no application to this case whatsoever.

Finally, in light of the specific facts of this case, the district court narrowly tailored a remedy which promoted both comity and judicial economy. The district court also expressly

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[13] Significantly, this Court very recently held that it would not issue a declaratory judgment on the question of whether Chapter 154 of the AEDPA applies to the State of California. Calderon v. Ashmus, __ U.S. __ (May 26, 1998). The Court held that the matter was not justiciable under the Declaratory Judgment Act because the petitioner essentially sought an advance ruling upon a hypothetical state of facts. The same is true here because Taylor has not yet (and may never) return to federal court to seek to amend his currently filed habeas petition.

recognized the utmost good faith in which Taylor filed his petition in reliance on the Local Rule then in effect and the fact that Taylor has diligently prosecuted his case ever since. This Court should decline the State's invitation to scrutinize the fact-specific, narrow holdings of the district court and the Ninth Circuit in this case.

B. A District Court Has The Authority to Direct a Petitioner Such As Taylor To Amend His Petition By Deleting Unexhausted Claims.

The State has not challenged the first step of the procedure adopted by the district court in this case, nor could it. Having found that Taylor's petition was mixed rather than fully exhausted, the district court first ordered Taylor to amend his petition by deleting unexhausted claims and filing an amended petition containing only exhausted claims. As this Court is well aware, the district court had to look no further than this Court's holding in Rose v. Lundy[14] for the authority to so order. In Rose, this Court explained that when a petition is found to contain unexhausted claims, the petitioner "can always amend the petition to delete the unexhausted claims" in lieu of suffering a dismissal.[15] The district court's conclusion was likewise consistent with a long line of Ninth Circuit precedent.[16]

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[14] 455 U.S. 509 (1982).

[15] Id. at 522.

[16] See, e.g., Reutter v. Crandel, 109 F.3d 575 (9th Cir.1997) (petitioner may choose to strike unexhausted claims) ; James v. Borg, 24 F.3d 20, 24 (9th Cir. 1994) (citing Rose for proposition that "a petitioner may . . . choose to strike any unexhausted claims . . ."), cert. denied, 513 U.S. 935 (1994); Roman v. Estelle, 917 F.2d 1505, 1506 (9th Cir.1990) (holding petitioner must be given opportunity to amend mixed petition to include only the exhausted claims); Guizar v. Estelle, 843 F.2d 371, 372 (9th Cir.1988) (holding petitioner may resubmit petition with only exhausted claims); Ostrosky v. State of Alaska, 913 F.2d 590, 593 (9th Cir. 1990) (petitioner permitted to amend petition to delete unexhausted claim without first having to suffer a dismissal);

(continued...)

C. Federal Courts Have Recognized The Propriety of Holding An Exhausted Habeas Petition In Abeyance Pending Exhaustion of State Remedies.

1. A District Court Has The Authority to Manage Its Own Docket By Holding An Exhausted Petition In Abeyance.

Contrary to well-established rules and procedures, the state seeks relief which effectively asks this Court to intrude on the district court's authority to manage its case docket. Rule 4 of the Rules Governing Section 2254 Cases in the United States District Court requires the district court, once it determines that a habeas petition is not patently frivolous, to order respondent to file an answer or other pleading within a time period fixed by the court, "*or to take such other action as the judge deems appropriate.*"[17] As the Advisory Committee Note indicates, the purpose of this language is to "afford the judge flexibility" where either dismissal or an order to answer may be inappropriate.

This rule simply confirms the generally recognized principle that a district court "has the power to control its docket."[18] In addressing a nearly identical situation, the Eleventh Circuit Court of Appeals responded to a similar claim in language that bears repeating here:

> The State's contention that the district court had no power to grant a continuance of the habeas petition pending before it, or abused its discretion in doing so, is patently without merit. The court has the power to control its docket. So long as it abides by the limits of discretion, it can leave a habeas petition dormant on its docket while the petitioner presents to the state court unexhausted claims.

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[16](...continued)
Neuschafer, 860 F.2d 1470 at 1475 (citing Rose for proposition that a petitioner "may be allowed to amend his petition to delete the unexhausted claims").

[17] (Emphasis added).

[18] Thompson v. Wainwright, 714 F.2d 1495, 1499 (11th Cir. 1983).

> The express aim of the district court, set out in its carefully phrased order, was to enable all constitutional claims to be settled in one federal habeas proceeding. Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198 (1982) does not forbid the continuance. The petitioner did not file a mixed petition seeking rulings on unexhausted claims. To the contrary, he asked that ruling on his exhausted claims be withheld until unexhausted claims could be presented to the state court and then all claims, properly exhausted, considered in the federal court at one time. *This furthers the interests underlying Rose rather than impedes them.*[19]

The discussion in Thompson highlights the absurdity of the State's claim that the procedure employed here is inconsistent with the United States Supreme Court's decision in Rose. Indeed, the district court here has chosen the stay/abeyance procedure as the most efficient and equitable method of managing this case while furthering the interests of comity, judicial economy, and avoiding piecemeal litigation. The exhausted claims will remain dormant on the district court's docket only while Taylor awaits decision by the California Supreme Court on his remaining claims, filed in that court on June 27, 1997.

2. The Stay/Abeyance Procedure Implemented by the District Court Promotes Comity and Does Not Thwart Exhaustion Principles or Run Afoul of Rose v. Lundy.

In Rose v. Lundy, supra, this Court held that a state prisoner's petition for writ of habeas corpus in a federal court based on an alleged federal constitutional violation will not be granted unless the petitioner has exhausted the remedies available in state court. The central concern of this Court in Rose was *not* to ensure that the habeas proceedings moved as rapidly as possible, as the State seems to suggest, but rather to ensure the preservation of comity between the state and federal courts by requiring that each claim advanced in federal court had first been presented to the highest state court available. The Rose Court recognized the important role reserved for state

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[19] Id. (Emphasis added).

courts in the federal habeas arena and strove to protect it to the greatest degree possible. This Court emphasized that the rule which it announced "promotes comity and furthers the purposes underlying the exhaustion doctrine . . . of protecting the state courts' role in the enforcement of federal law and preventing disruption of state judicial proceedings." Id.

In this case, Taylor acknowledges that under Rose, as interpreted by this Court in Greenawalt and Gordon, a district court may neither stay nor adjudicate a *mixed* petition. Holding an *exhausted* claims petition in abeyance, however, does nothing to offend the principle of comity — to the contrary, the procedure actually *promotes* comity — and is therefore entirely consistent with this Court's holding in Rose.

Pursuant to the district court's order, Taylor filed his unexhausted claims in the California Supreme Court on June 27, 1997 and the district court will not entertain those claims until they have been reviewed by the state court. All that remains in federal court is a fully exhausted petition, which the district court will not address until the state court has completed its review of Taylor's remaining claims. Moreover, the district court has vacated its stay of execution and ordered that any further stay of execution pending exhaustion must be sought by Taylor in state court. Taylor has not initiated further action or sought relief in federal court, nor does he intend to do so until the California Supreme Court has had the opportunity to review -- and perhaps grant relief on -- his unexhausted claims. Thus, by holding the *exhausted* claims in abeyance and vacating the federal stay of execution, there is no conceivable intrusion into or interference with state and federal court comity.

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3. The Procedure Utilized By the District Court Has Been Repeatedly Endorsed By The Ninth Circuit and the Courts Of Other Circuits.

While both this Court and the Ninth Circuit have explicitly held that a federal district court may not hold a *mixed* petition in abeyance pending the exhaustion of state claims by a petitioner, there exists no authority from any court which mandates the dismissal of a fully *exhausted* petition. Likewise, no case or rule directs a federal district court that it must order the respondent to answer or otherwise respond to a petition within any specific amount of time. Such decisions have always been (and are properly) left to the district court under its inherent power to manage its own docket.

In fact, the law of the Ninth Circuit is explicit on this point. Under Ninth Circuit law, a district court has the authority and discretion to hold a federal petition containing only exhausted claims in abeyance pending state court exhaustion and to allow subsequent amendment with the newly exhausted claims. Such discretion remains undisturbed by the Greenawalt and Gordon decisions. For example, in Fetterly v. Paskett,[20] the Ninth Circuit applied the liberal amendment standards of Rule 15 in holding that a district court erred when it refused to stay federal habeas proceedings, hold the petition in abeyance pending exhaustion of state remedies, and allow the petitioner to amend his federal petition with the newly exhausted claims. Fetterly's lawyer, who represented him at all stages of the state court proceedings, had filed a fully exhausted federal habeas petition on his behalf. Several months later, a second lawyer entered the case and, on the basis of a state court decision issued six days before Fetterly's federal habeas petition was filed, filed a second state habeas petition asking the federal district court to stay the federal proceedings to allow him to exhaust the new claim. The district court denied the request. Id. at 1298. The

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[20] 997 F.2d 1295 (9th Cir.1993).

Ninth Circuit ruled that it was an abuse of discretion to deny the request for a stay because Fetterly's unexhausted claim was cognizable on federal habeas and because his counsel may have been ineffective in failing to raise the unexhausted claim in state court. Id. at 1302. In reaching this result, the Ninth Circuit noted that,

> it is understandable that [counsel] wished to bring all his claims in one pending proceeding rather than move to dismiss and start again when he had fully exhausted his new issues. There is nothing at all in this record to suggest that the motion for a stay was brought to delay, to vex, or to harass, or that the request was an abuse of the writ.

Fetterly, 997 F.2d at 1302.

Fetterly remains good law in the Ninth Circuit. Indeed, the Ninth Circuit suggested in Greenawalt and Gordon that the holding of Fetterly can be applied to hold a fully exhausted petition in abeyance while a petitioner presents his unexhausted claims in state court. Both cases held that although a district court does not have the authority to stay a *mixed* petition, a federal petition containing only *exhausted* claims may be stayed by the district court under its inherent power to manage its own docket. In Greenawalt, the Ninth Circuit expressly noted that:

> "In Fetterly, we held that a district court should have stayed, rather than dismissed, a valid habeas corpus petition containing only exhausted claims to give the petitioner time to exhaust several newly-discovered claims in state court. *A district court has discretion to stay a petition which it may validly consider on the merits.*"[21]

Accordingly, under Ninth Circuit law, an exhausted federal petition may be stayed by a federal district court while unexhausted claims are pursued in state court.

Nor is there any conflict between the Circuit Courts on this point. The practice of staying an exhausted petition while unexhausted claims are pursued in state court, designed to achieve

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[21] Greenawalt, 105 F.3d at 1274 (emphasis added).

equally the goals of judicial economy and fairness, is consistent with that endorsed in other circuits.[22] The abeyance procedure also has been utilized by circuit courts to permit exhaustion of state remedies. [23]

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[22] See, e.g., Burris v. Farley, 51 F.3d 655, 658 (7th Cir. 1995) (noting that filing a petition raising exhausted claims and asking the court for a stay until the remaining issues have been exhausted is appropriate and analogous to asking a district court to suspend proceedings in civil litigation where one or more claims is unripe, but other ripe claims must be filed within a specified statute of limitations); Lawson v. Dixon, 3 F.3d 743, 748 (4th Cir. 1993) (noting magistrate judge held proceedings in abeyance pending resolution of relevant state court proceedings), cert. denied 510 U.S. 1171 (1994); Andrews v. Deland, 943 F.2d 1162, 1168, n.3 (10th Cir. 1991) (noting district court stayed proceedings pending exhaustion of state remedies), cert. denied, 502 U.S. 1110 (1992); Simmons v. Lockhart, 915 F.2d 372, 377 (8th Cir.1990) (citing cases); Nichols v. Perini, 818 F.2d 554, 556 (6th Cir. 1987) (noting that district court held proceedings in abeyance to permit exhaustion); Arango v. Wainwright, 716 F.2d 1353, 1355 (11th Cir. 1983) (federal proceedings should be held in abeyance in interests of judicial economy until all claims are exhausted in state proceedings), cert. denied, 469 U.S. 1127 (1985); Thompson v. Wainwright, 714 F.2d 1495, 1499 (1983) (district court's order leaving habeas petition "dormant" on its docket while petitioner presented unexhausted claims to state court furthers interests underlying Rose v. Lundy, supra, 455 U.S. at 509, where petitioner filed exhausted claims only petition); Moore v. Scully, 956 F.Supp. 1139 (S.D.N.Y. 1997) (district court granted motion to hold in abeyance and placed case on "suspense docket" to permit exhaustion); cf. Stano v. Singletary, 952 F.2d 1273 (11th Cir.1992) (granting petitioner's motion and remanding with instructions to permit exhaustion); Hill v. Butterworth, 170 F.R.D. 509, 1997 WL 16132 *7 (N.D.Fla. Jan. 16, 1997) (in certifying the action as a class action and declaring that Chapter 154 of the 1996 Act does not apply to Florida capital petitioners, court notes that habeas proceedings have been held in abeyance to await court's determination).

[23] See, e.g., Hatch v. Oklahoma, 58 F.3d 1447, 1452 (10th Cir.1995) (appeal held in abeyance "pending petitioner's exhaustion of his claims in state court"), cert. denied, 116 S.Ct. 1881 (1996); Bush v. Singletary, 988 F.2d 1082, 1086 (11th Cir.1993) (appeal held in abeyance for petitioner to present unexhausted claim to Florida Supreme Court), cert. denied, 510 U.S. 1065 (1994); Palmer v. Grammar, 863 F.2d 588 (8th Cir.1988) (appeal held in abeyance "pending resolution of all proceedings in the Nebraska state courts"); Moore v. Kemp, 809 F.2d 702, 731 (11th Cir.1986) (appeal held in abeyance to permit presentation of unexhausted claims to state courts), cert. denied, 481 U.S. 1054 (1987); cf. Mills v. Singletary, 63 F.3d 999, 1008, n.10 (11th Cir.1995) (appeal held in abeyance on petitioner's motion to litigate recently exhausted claims filed in a successor petition in the district court), cert. denied, 116 S.Ct. 1837 (1996).

D. **The Interests of Judicial Economy and Avoiding Piecemeal Litigation Have Been Furthered by the District Court's Order Holding the Exhausted Claims in Abeyance Pending State Court Exhaustion.**

Not surprisingly, the State fails to address the significant drain on judicial resources that would result from forcing Taylor to elect between taking a dismissal without prejudice and then re-filing after exhaustion or pursuing only his exhausted claims forthwith. To the contrary, the State makes the blanket claim that "abeyance is the antithesis of prompt resolution,"[24] a statement which initially sounds convincing but which rings hollow when the facts of this case are examined. As noted by the district court, proceeding on the exhausted claims now would force Taylor to litigate the unexhausted claims in a successor petition, which "would only result in piecemeal litigation, a result the exhaustion and abuse of the writ doctrines are designed to avoid."[25] Had the district court denied the stay, there would have been a substantial risk that adjudication of the exhausted claims in federal court would have been completed before the state court disposed of the unexhausted claims, thus making a successive petition and multiple appeals a virtual certainty. Conversely, the possibility that the California Supreme Court may grant relief on any one of the unexhausted claims could render federal proceedings to adjudicate the exhausted claims useless -- a potential further waste of judicial resources.

Furthermore, the factual and legal interrelation of Taylor's exhausted and unexhausted claims makes it most efficient to adjudicate the claims in one proceeding. Once state exhaustion is complete, federal proceedings will resume and all claims will be litigated in an orderly fashion

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[24] State's Petition, p. 16.

[25] Appendix to State's Petition, p. 45.

in one petition.[26] By contrast, the State's proposed alternative of adjudicating the exhausted claims now, then returning with the newly exhausted claims later, would result in a substantial waste of resources. For example, the district court might be burdened with multiple evidentiary hearings, shifting representation of counsel, and duplicative investigation costs and expert fees.

Even if Taylor had exercised the option of a dismissal without prejudice, the re-filing of a subsequent petition would likely cause unnecessary and wasteful litigation because the State would assert the applicability of the AEDPA and its statute of limitations despite the fact that case petitioner diligently pursued his claims and filed them in federal court before AEDPA became law. Thus, in the interests of conserving scarce judicial resources, the district court should be permitted to use these reasonable means to ensure that all claims are litigated in a single proceeding.

E. The Stay and Abeyance Procedure Does Not Subvert the One Year Statute of Limitation Period Established by Amended 28 U.S.C. 2244(d).

In further support of its Petition, the State argues that the stay/abeyance procedure subverts the one-year limitation period for filing a petition established by the AEDPA. The State's argument is based purely on its speculation about what *might* occur in the future. According to the State, whose argument *assumes* that the California Supreme Court will not grant relief on the pending exhaustion petition, if the district court were to subsequently permit Taylor to amend his petition to add the newly exhausted claims (which claims would not otherwise meet the limitation period), this procedure would subvert the statute. In light of recent Ninth Circuit and United States Supreme Court developments, however, this argument is moot and must fail as applied to Taylor because his petition was filed nine months *before* the Act and the Act therefore has no

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[26] See McClesky v. Zant, 499 U.S. 467, 498 (1991).

application to his petition.

In December 1996, the Ninth Circuit held in Jeffries v. Wood,[27] that the Act's amendments to Chapter 153 of the AEDPA, which includes section 2244(d) (the one year statute of limitations), do not apply to "cases filed" in the federal courts of the Ninth Circuit before the Act's enactment." The Ninth Circuit subsequently clarified that "cases filed" in federal court are those in which a habeas petition was filed prior to the Act's effective date.[28] Although a Writ of Certiorari was sought in that case, it was denied by this Court.[29] Any ambiguity regarding the applicability of the AEDPA to this case was resolved in Lindh v. Murphy,[30] where this Court unequivocally held that the new provisions of Chapter 153 of the AEDPA, which include the one year statute of limitations, apply only to cases filed *after* the Act became effective. Taylor filed his federal habeas petition pursuant to the mandates of a Local Rule in July, 1995, *nine months before* enactment of the AEDPA.

The district court's order does not subvert the AEDPA's statute of limitations because the AEDPA does not apply to Taylor. Nor should the State should be permitted to use Rose and Greenawalt to thwart Congress's intent that the AEDPA should not apply to pending cases.

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27 103 F.3d 827 (1996).

28 Calderon v. United States District Court (Beeler), 112 F.3d 386 (9th Cir.1997).

29 __ U.S. __, 118 S.Ct. 1389 (April 6, 1998).

30 __ U.S. __, 117 S.Ct. 2059 (1997)

F. **The Stay/Abeyance Procedure and Subsequent Amendment of the Petition with the Newly Exhausted Claims Does Not Enable Taylor to Circumvent the Abuse of the Writ Doctrine.**

The State argues that the district court's intent to permit Taylor to amend his federal habeas petition following exhaustion of his currently unexhausted claims in state court violates the abuse of the writ doctrine. The State quotes this Court in Rose v. Lundy for the proposition that "a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions"[31] and then argues that the principle of abuse of the writ applies equally to amended petitions, despite the fact that Rose spoke only of "subsequent" petitions.

The State's concern with prospective amendment under Rule 15 is premature and should not be entertained at this time. Taylor has *not yet attempted* the procedure which the State seeks to challenge. Nor has either side fully briefed the issue. Finally, and perhaps most important, this issue has never been placed squarely before the lower courts, nor could it have been, given the procedural posture of this case. Neither lower court issued a ruling on this issue: instead, both the district court and the Ninth Circuit declined to issue an advisory opinion on an issue that had not yet become ripe for review.

Moreover, the stay/abeyance procedure implemented by the district court furthers the policies underlying the abuse of the writ doctrine, which is deeply rooted in the need for finality and conservation of judicial resources.[32] As discussed above, the stay/abeyance procedure will

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[31] Rose, 455 U.S. at 521.

[32] See McClesky, 499 U.S. at 493-494.

discourage piecemeal litigation and conserve judicial resources because the district court will adjudicate a single petition upon completion of state court exhaustion. By contrast, the procedure urged by the State — having the district court litigate the exhausted claims now and the newly exhausted claims later — will substantially burden the district court with multiple petitions. Similarly, the stay/abeyance procedure implemented by the district court does not impede the State's interest in finality. Indeed, the only possibility of delay at this stage rests with the California Supreme Court, which is presently considering Taylor's unexhausted claims. The State's claim that *petitioner* has sought to delay adjudication of the petition is belied by the ____ extensions of time which the *State* sought from the California court for the filing of the State's informal response to Taylor's pending exhaustion petition. Finally, it should be noted that the State's disingenuous concerns with the abuse of the writ doctrine are merely a smokescreen for its true agenda: forcing a dismissal of Taylor's petition and later arguing that a re-filed petition is untimely under the AEDPA's statute of limitations or, in the alternative, enlisting the assistance of the district court (and this Court) in forcing Taylor into a successor posture. Surely, the abuse of the writ doctrine was not designed to advance such a result which would cast AEDPA's net to cover cases filed *well before* AEDPA's enactment.

G. The Equities Here Support the District Court's Decision to Hold the Exhausted Claims Petition in Abeyance Pending State Court Exhaustion.

After correctly determining that Ninth Circuit authority provided it with discretion to employ the stay/abeyance procedure at issue here, the district court proceeded carefully and thoughtfully to assess the equities of this case, and found substantial reasons to exercise its discretion. Taylor submits that such equities, worth reiterating here, should lead this Court to

decline the State's invitation to review the district court's order and the Ninth Circuit's decision to uphold that order.

Like the petitioner in Fetterly, Taylor did not seek a stay "to delay, to vex, or to harass."[33] Unlike the petitioner in Greenawalt, Taylor did not submit a bare-bones successor petition containing only a single unexhausted claim and filed on the eve of the passage of the AEDPA; rather, he filed a fully-developed petition containing numerous fully exhausted claims (an, in keeping with the former Local Rule, other unexhausted claims) nine months before enactment of the AEDPA. Moreover, this Court has suggested that the equities favoring a stay are also greater where the petition, such as the petition at issue here, is a *first* rather than a successive petition.[34]

Taylor has at all times acted in accordance with the case law, orders and local rules of the district court, the Ninth Circuit, and this Court. As described above, Taylor initially filed a mixed petition in accordance with the former Northern District Local Rules. After filing his petition, Taylor repeatedly sought guidance and clarification from the district court; he should not be penalized now for this diligence. As noted by the district court, Taylor's reliance on Local Rule 296-8(e), which governed his case at the time of filing, provided him with clear guidance and justification for not presenting his unexhausted claims to the state court earlier: "Before Greenawalt and Gordon were decided, (Taylor) was fully justified in believing he could file a mixed petition, obtain a ruling on the exhaustion status of the claims, and then present the

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[33] Fetterly, 997 F.2d at 1302.

[34] Lonchar v. Thomas, 116 S.Ct. 1293, 1299 (1996) ("dismissal of a first federal petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty").

unexhausted claims to the state court."[35]

Moreover, the State's insinuation that Taylor chose to sit passively by while he awaited the district court's exhaustion ruling is completely disingenuous, unfounded, and contrary to the record. Indeed, Taylor made numerous attempts to obtain a ruling so that he could proceed to exhaust his claims in state court. First, at the October, 1995 hearing on Respondent's Motion to Dismiss, Taylor offered to submit briefing as to which claims he deemed exhausted; the court declined.

Rather than waste state judicial resources by filing a state petition in which he essentially guessed on the court's view of which claims were exhausted (necessarily erring on the side of over-inclusiveness), Taylor continued to await the district court's order. Significantly, however, he made further attempts to obtain the orders which the district court indicated would be forthcoming and to seek guidance as to the applicability of the AEDPA. First, following enactment of the AEDPA, Taylor filed an Ex-Parte Request for Status Conference and Briefing Schedule on June 18, 1996 setting forth the substantive new issues created by the AEDPA and seeking the court's guidance regarding the potential impact of the new Act. No response was issued by the district court. Accordingly, on August 15, 1996, Taylor submitted a letter expressing concern that no status hearing had been scheduled and also inquiring about the pending and un-issued orders regarding exhaustion and discovery that were promised by the district court.

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[35] State's Appendix to Petition for Writ of Certiorari at 44.

Significantly, the district court explained that in light of Greenawalt and Gordon, "petitioners from here forward will have a lesser reliance interest," thus rendering moot the State's argument that staying the exhausted claims will only encourage petitioners to file mixed petitions in the future. Id. at 46.

These efforts can hardly be characterized as 'sitting passively.' To the contrary, Taylor followed the explicit instructions of the district court at all times and pursued all avenues of communication available to clarify his position.

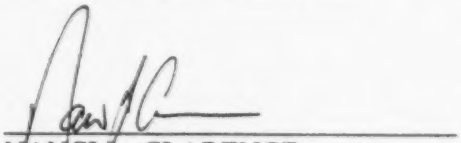
III. CONCLUSION

The district court here fashioned a narrow remedy in response to a unique factual situation in a shifting legal landscape. The district court's order promotes comity and does not violate, either in letter or in spirit, any ruling of a higher court. The central harm of which the State complains — the possibility that a future court may find that the petition, once refiled, constitutes abuse of the writ — is prematurely before this Court, not having been briefed or decided by any lower court. This Court should deny the State's Petition for Writ of Certiorari at this time.

Dated: June 12, 1998

Respectfully submitted,

CLARENCE & SNELL, LLP

By: 

NANCI L. CLARENCE
Attorneys for Respondent
FREDDIE LEE TAYLOR

PROOF OF SERVICE

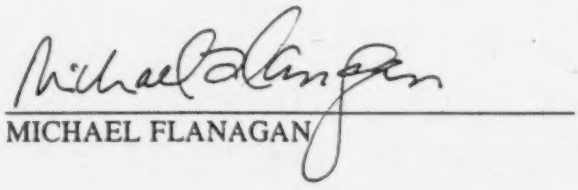
I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action. My business address is 899 Ellis Street, San Francisco, California 94109. On the date specified below, I served by mail, a true and correct copy of the attached document:

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

by placing the same in an envelope, sealing, fully prepaying postage thereon and depositing said envelope in the U.S. Mail at San Francisco, California. Said envelope was addressed as follows:

Joan Kileen
Deputy Attorney General
50 Fremont Street, Room 300
San Francisco, CA 94105

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 12, 1998, at San Francisco, California.



MICHAEL FLANAGAN

Supreme Court, U.S.
FILED
JUN 22 1998
CLERK

No. 97-1841

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

v.

FREDDIE LEE TAYLOR, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
DANE R. GILLETTE
Senior Assistant Attorney General
RONALD S. MATTHIAS
Supervising Deputy Attorney General
JOAN KILLEEN
Supervising Deputy Attorney General
Counsel of Record
50 Fremont St., Room 300
San Francisco, CA 94105
Telephone: (415) 356-6193
Fax: (415) 356-6190
Counsel for Petitioner

14pp

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No. 97-1841

ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

v.

FREDDIE LEE TAYLOR, *Respondent*.

Respondent Freddie Lee Taylor (Taylor) contends that certiorari should be denied because the procedural posture of this case cannot recur in light of the Ninth Circuit Court of Appeals' recent rulings, and because the State's argument that Taylor's amended petition will be abusive is premature. Typically, Taylor ignores the central argument in the State's petition and distorts the procedural posture of this and similarly situated cases in an effort to portray compliance with the rules governing habeas corpus. His effort falls woefully short.

The Widely Recurring Practice of Abeyance Pending Exhaustion Arises in Both Pre- and Post-Act Cases and Will Continue Unless Halted by this Court

Taylor contends the issue raised in the State's petition affects only a handful of cases and that "the stay and abeyance procedure was a measured response to manage petitions brought during a maelstrom of changes in the law, a circumstance which only existed for a brief window of time." Opp. at 6. His contentions are not only meritless, they are contradicted by his own argument.

In 1995, Taylor deliberately filed a mixed petition under former Northern District Local Rule 296-8(e). The State moved to dismiss the petition on exhaustion grounds. The District Court declined to dismiss the petition, stating instead that it would hold the mixed petition in abeyance pending exhaustion in state court. The District Court further stated it would issue a ruling identifying the claims it found unexhausted, yet no ruling issued.

Well over a year later, the Ninth Circuit held that the previous practice of holding mixed petitions in abeyance would no longer be permitted. *Calderon v. United States District Court (Gordon)*, 107 F.3d 756 (9th Cir.), *cert. denied*, 118 S.Ct. 265 (1997); *Greenawalt v. Stewart*, 105 F.3d 1268 (9th Cir.), *cert. denied*, 117 S.Ct. 1794 (1997). The State moved for reconsideration of the District Court's oral ruling that it would hold Taylor's mixed petition in abeyance. The District Court ultimately ruled that Taylor could delete his unexhausted claims, that it would hold the amended petition containing only exhausted claims in abeyance, that Taylor could pursue exhaustion of his remaining claims in state court, and that following exhaustion, he could file a second amended petition in the District Court.

On June 27, 1997, Taylor filed his second petition for writ of habeas corpus in the California Supreme Court, the first having been denied on September 26, 1990. On December 17, 1997, the California Supreme Court asked the State to respond to the petition. The State's response was filed on June 1, 1998, and the petition remains pending in state court. Taylor's federal petition remains abeyant in federal court.

Contrary to Taylor's argument in opposition, the issue before this Court is *not* whether a district court can hold in abeyance a *mixed* petition, *nor* is it whether the former local rule was invalid. The Court of Appeals resolved those issues against Taylor and similarly situated petitioners well before the District Court ruled on the

State's motion to dismiss, as the District Court acknowledged. App. B at 30-33. However, the District Court found a simple way around the Court of Appeals' proscription against holding mixed petitions in abeyance. It simply directed Taylor to delete the unexhausted claims and then ruled it could hold a petition containing only exhausted claims in abeyance. App. B at 39-46.

The issue raised in the Court of Appeals, and the issue raised here, is whether a district court can hold in abeyance a petition containing only exhausted claims so that the petitioner can return to state court to pursue exhaustion of his remaining claims, and thereafter return to federal court with an amended petition. The issue can and will arise in cases in which the initial petition was filed before enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (Act) (as it did here and in *Calderon v. United States District Court (Thomas)*, ___ F.3d ___, 1998 WL 236971 (9th Cir. 1998) (allowing abeyance *and* discovery on the "abeyant" petition), *petition for rehearing and rehearing en banc pending)*, and in cases in which the petition was filed after enactment of the Act (e.g., *Ashmus v. Calderon*, 977 F.Supp. 987 (N.D. Cal. 1997)).[1]

That Taylor initially filed a mixed petition is inconsequential to the breadth and scope of the issue presented in the instant petition. The question presented, which can and assuredly will arise regardless whether a

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1. A sampling of habeas cases in which district courts in California have issued unpublished orders holding petitions abeyant pending exhaustion of additional claims in state court include: *Anthony v. Cambra*, No. C-97-2232-FMS; *Clark v. Calderon*, No. C-97-20618-JW; *Rodrigues v. Calderon*, No. C-96-1831-CW; *Nicolaus v. Calderon*, No. C-95-2335-MMC; *Johnson v. Calderon,* No. C-95-0305-TEH; *Freeman v. Calderon*, No. C-95-3368-FMS; *Roberts v. Calderon*, No. CIV-S-93-0254-GEB; and *Mickle v. Calderon*, No. C-92-2951-TEH.

mixed petition was filed initially, concerns abeyance of a presumptively valid petition for the sole purpose of awaiting exhaustion of claims of which a petitioner was aware when he filed the petition. That situation has arisen in numerous cases in which petitioners have filed habeas petitions to effect ostensible compliance with the Act's statute of limitations, but in which the petitioners have asked for abeyance in order to exhaust claims that could not yet be included in the petition. The issue is not limited to cases solely in the identical procedural posture as Taylor's.

The issue whether petitions can be held in abeyance pending exhaustion is thus not limited to pre-Act cases or cases in which mixed petitions were filed, nor is it limited to cases in which petitions were being filed during a period of change in the law. Taylor's citation to earlier cases and to cases from other circuits that have allowed the abeyance procedure, Opp. at 11-12, 14-16, nn.22, 23, shows that the procedural device has been utilized since well before passage of the Act, and that its application has nothing to do with any "maelstrom of changes in the law," but is simply a contrivance to defeat *Rose v. Lundy*, 455 U.S. 509 (1982). In that case, the Court stated a clear and simple rule for habeas petitioners: before bringing *any* claims to federal court, make sure that *each* claim has been exhausted in state court so that a *single* petition may be filed. *Id.* at 520. That the avoidance of this simple rule is as widespread as petitioner contends is hardly reason to throw out the rule, rather than demand compliance. The widespread employment of the abeyance artifice, both in the district courts and the courts of appeals, also defeats *In re Blodgett*, 502 U.S. 236, 239-40 (1992) and *McCleskey v. Zant*, 499 U.S. 467 (1991).

Moreover, Taylor's argument that abeyance has been widely utilized is directly contrary to his claim that abeyance is merely a "measured response" to circumstances existing only in a brief window of time, and

only in California at that. *See* Opp. at 6. Taylor's willingness to engage in such transparently hollow arguments demonstrates his utter failure to take the rules governing habeas seriously.

Noncapital pro se petitioners have recently begun to realize that they, too, can distort the rules of habeas just as easily as capital petitioners represented by counsel. Pro se petitioners are now asking for abeyance of their petitions so that they can return to state court to exhaust claims, seemingly secure in the knowledge that they have staked out their spot in federal court with an ostensibly timely petition.[2/] Whether the initial petition is mixed or contains only exhausted claims, the requested relief is the same. A mixed petition can easily be amended to delete unexhausted claims, as here, or the petitioner can file only the exhausted claims in the first instance.[3/] Either way, the petitioner asks for abeyance pending exhaustion, thus nullifying the rule of *Rose*.

Ignoring the State's argument and the legal landscape of which he is well aware, Taylor piously asserts that he has "proceeded with the utmost attention to all filing deadlines and has never sought any unwarranted delay." Opp. at 2. He ignores the fact that there were *no* filing

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2. The standard argument, both by petitioners and by district courts, is that Rule 15(c), Federal Rules of Civil Procedure, allows relation back of any amendment in a habeas proceeding. *See* Opp. at 20; Petition for Writ of Mandate to the Ninth Circuit, Exhibit D at 10, 17. Hence, the statute of limitations is nearly rendered meaningless.

3. Petitioners are now careful to seek abeyance on petitions containing only exhausted claims because of amended 28 U.S.C. § 2244(b)(1), which mandates dismissal of claims filed in a second or successive application that were presented in a prior application. An unexhausted claim presented in a prior application, even if deleted to avoid the mixed petition proscription, would thus be barred. *Compare* 28 U.S.C. § 2244(b) (1966) (allowing dismissal of successive claim if claim was previously denied on the merits).

deadlines until the Act was passed, and that he has vigorously opposed the application of any filing deadlines to his case. He also ignores the fact that his case has been pending in federal court for well over six years; that it took his two federally funded attorneys over three years to file a defective, mixed petition; that he took no steps to exhaust his many unexhausted claims during the next two years, despite his attorneys' expertise in habeas proceedings and knowledge of which claims they had not presented in state court; and that it was not until the District Court finally ordered him to delete his unexhausted claims and return with them to state court that he took any action at all.

Taylor's claim of adherence to the rules governing habeas petitions at the time he first filed his petition means only that he took his time filing that petition, which was deliberately defective, comfortable in the knowledge that the District Court would permit the delayed filing and that he would suffer no adverse consequences. It was not until the Act was passed, and the Court of Appeals prohibited the abeyance of mixed petitions, that Taylor realized he might actually have to litigate his claims. However, the District Court, at his suggestion, managed to circumvent the Court of Appeals' effort to restore some meaning to the exhaustion doctrine. It utilized the procedural device at issue here--the abeyance of an exhausted claims petition. The Court of Appeals, determining itself bound by prior precedent in a related context, felt compelled to deny mandamus.[4/]

Taylor's claim that the device simply reflects the District Court's effort to control its docket, Opp. at 11, is patently frivolous. No effort to control a docket is at issue here, nor did the District Court rely on any such rationale.

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4. Nothing in the Court of Appeals' opinion suggests it was addressing only a narrow issue that it was convinced was not likely to recur.

Rather, the District Court has fashioned a procedural device that enables a petitioner to ignore the requisites of exhaustion and simply file a petition containing one or more exhausted claims that can then be held abeyant. Since the very reason for holding the petition abeyant--the contemplated amendment with additional claims of which the petitioner was already aware--violates the abuse of the writ doctrine, it cannot be justified as a valid exercise of discretion. Nor can the Rules Governing Section 2254 Cases be read to allow a district court to ignore this Court's interpretation of federal law.

The State's request that this Court grant the petition and restore the mandate of *Rose* does not merely affect a handful of cases. On the contrary, the issue could arise in any case, and there are many, in which a petitioner seeks to mark his place in federal court before he has exhausted his state court remedies. The implementation of a statute of limitations drives this effort in many cases. So too the ever increasing, and successful, delay in capital cases.

Taylor's Contemplated Second Amended Petition Constitutes an Abuse of the Writ as a Matter of Law

Taylor, misconstruing the issue, claims that the "State's putative concern is that the amended petition which eventually may be filed will not be subject to an abuse of the writ challenge." Opp. at 9. He also claims that the issue was not fully briefed and that the lower courts did not address it. *Id*. at 9, 20.

How Taylor can claim that the issue was not addressed below is difficult to comprehend. The State raised the argument before the district court, App. B at 39-40, and the issue was central to its argument before the Court of Appeals. That court not only considered the argument, it concluded the State was "clearly correct" in its contention that "'subsequent amendment of a formerly exhausted petition to add newly exhausted claims . . .

could be barred as an abuse of the writ.'" App. A at 17. The court noted Taylor had "candidly conceded" his anticipated second amended petition would be subject to an abuse of the writ challenge. *Id.* Taylor's refusal to accept this straightforward holding, Opp. at 21, is typical of his resistance to the imposition of any rule and his resort to claims that rulings contrary to his position are merely dicta.[5] *See, e.g.,* App. B at 32-33.

Taylor claims the State fails to address the significant drain on judicial resources that would result from requiring his election between dismissal and proceeding on his exhausted claims. Opp. at 17. Again, he misses the point of the State's argument. Taylor's failure to exhaust numerous claims establishes that he should not have filed a federal petition in the first place. He has created the drain on judicial resources and intends to further that drain by filing multiple amended petitions. He thinks he is entitled to maintain federal jurisdiction by parking his claims in federal court while he litigates other claims in state court, and that he is entitled to file an amended petition adding new claims following exhaustion.

The procedure he has followed, which the District Court and Court of Appeals have sanctioned, necessarily entails the filing of multiple petitions and the consequent delay in federal adjudication while the petitioner returns, sometimes repeatedly, to exhaust claims in state court. The State objects to this ping-pong game between state

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5. We note that despite the Court of Appeals' plain holding in this case, a subsequent Ninth Circuit panel, addressing an identical situation, asserted that "*Taylor*'s statement on this point is merely an observation and has not [sic] precedential effect." *Calderon v. United States District Court (Thomas)*, ___ F.3d at ___, 1998 WL 236971. Petitioners will therefore argue that amendment following abeyance is not subject to an abuse of the writ challenge, and the State will have to begin this entire process anew. We ask the Court to clarify this important issue, and hold that such an amendment is indeed an abuse of the writ.

and federal courts. Taylor has now filed a petition containing exhausted claims. He must pursue those claims. A future petition containing the newly exhausted claims will be abusive and thus must be dismissed under *McCleskey v. Zant*, 499 U.S. 467, because no excuse can justify Taylor's failure to properly present claims of which he was aware and which he deliberately withheld rather than proceed in conformance with this Court's mandate under *McCleskey* and *Rose*. A fortiori, Taylor cannot meet the standard for filing a successive petition under the Act. 28 U.S.C. § 2244(b)(2).

Taylor claims there would have been "wasteful litigation" over the applicability of the Act on a newly filed petition had he taken a dismissal rather than abeyance. Opp. at 18. In order to avoid such "wasteful litigation," Taylor contends the District Court properly allowed him to simply park his exhausted claims in federal court while he pursued exhaustion on other claims. His contention is frivolous. The State has already made clear its view that Taylor's filing of an amended petition in April 1977 mandates the Act's application. The filing of any future amended petition will necessarily also be subject to the Act. Taylor's assumption that this issue can be avoided because he thinks the Act does not apply to him is wishful thinking. In any event, it is only one aspect of the issue in this petition, which is whether a district court can ignore the rules of *McCleskey* and *Rose* by allowing the piecemeal presentation of claims through the procedural device of abeyance pending exhaustion followed by amendment.

Finally, Taylor asserts that "the equities" support the District Court's decision to hold his petition abeyant pending exhaustion. The State submits that no equities justify Taylor's piecemeal litigation. His game-playing, and that of petitioners who have engaged in the same tactics of delay and manipulation, must come to an end.

CONCLUSION

For the reasons stated, the State respectfully asks that the petition for writ of certiorari be granted.

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Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
DANE R. GILLETTE
Senior Assistant Attorney General
RONALD S. MATTHIAS
Supervising Deputy Attorney General

JOAN KILLEEN
Supervising Deputy Attorney General
Counsel of Record

Counsel for Petitioner

JK:ds
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